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# THE "DECOLONIZATION" OF EAST TIMOR AND THE UNITED NATIONS NORMS ON SELF-DETERMINATION AND AGGRESSION

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# The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression

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## Introduction

The island of Timor lies some 300 miles off the northwest coast of Australia, at the tip of the main chain of islands forming the Republic of Indonesia. Before World War II, the western half of the island was administered by the Netherlands, the eastern half by Portugal. When Indonesia gained its independence from the Netherlands in 1949, the western half became Indonesian Timor, a part of Indonesia. Portugal continued to administer the eastern half of the island, East Timor, until 1975. East Timor was evacuated by the Portuguese authorities in August, 1975 during civil disorders condoned, if not fomented by the Indonesians. Within a few months, Indonesia invaded and purported to annex East Timor.

It is estimated that, since 1975, more than 100,000 East Timorese have died from war, famine, and disease. Most of these deaths occurred after the Indonesian invasion and occupation. This Chapter analyzes Indonesia's actions and concludes that they violated international law, specifically the norms regarding self-determination and aggression.[1]

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[1]. In his syndicated column dated November 8, 1979, Jack Anderson estimated that about half of the 1975 population, which he gave as 600,000, had been "wiped out by warfare, disease and starvation." Anderson, *Island Losing a Lonely Infamous War*, Wash. Post, Nov. 8, 1979, § DC, at 11, col. 4. Most observers would put the number at less, but there is no doubt that the Indonesians perpetrated a massive human tragedy. The International Red Cross, which had been actively involved in humanitarian work in the aftermath of the August, 1975 civil war, was forced to leave the country at the time of the Indonesian invasion. The Indonesians did not have the will or the logistical resources to alleviate suffering in the territory, and, until 1979, denied entry to international aid organizations that did have the capacity to respond. The International Committee of the Red Cross was permitted to return in October, 1979 but only on a limited basis. After completing an assessment mission to the territory the medical coordinator of relief efforts in East Timor of the International Committee of the Red Cross stated in February, 1980 that the situation was among the worst he had ever seen. *See generally* 35 U.N. GAOR, C.4 (9th mtg.) 9, U.N. Doc. A/C.4/35/SR.9 (1980) (statement of R. Clark), *reprinted in* CULTURAL SURVIVAL INC., EAST TIMOR 11 (1981); On the East Timor issue in its broader aspects, *See*, J. JOLLIFFE, EAST TIMOR (1978); J. RAMOS HORTA, FUNU: THE UNFINISHED SAGA OF EAST TIMOR (1987); J. TAYLOR, THE INDONESIAN OCCUPATION OF EAST TIMOR 1974-1989, A CHRONOLOGY 1990; Kamm, *The Silent Suffering of East Timor*, The N.Y. Times, Feb. 15, 1981, § 6 (Magazine), at 34; *Human Rights in East Timor and the Question of the Use of U.S. Equipment by the Indonesian Armed Forces: Hearings Before the Subcomm. on International Organizations and on Asian and Pacific Affairs of the Comm. on International Relations*, 95th Cong., 1st Sess. 1 (1977); *Human*

## I. Recent Political History of East Timor

From the mid-1950s until the mid-1970s, Portugal refused to comply with United Nations policy regarding the administration of non-self-governing territories.[2] As provided in Article 73(e) of the United Nations Charter, states responsible for the administration of territories whose people have not yet attained "a full measure of self-government" must regularly transmit to the Secretary-General "statistical and other information of a technical nature relating to economic, social and educational conditions in the territories."[3] When Portugal became a member of the United Nations in 1955, it claimed to administer no non-self-governing territories[4] and therefore refused to give to the Secretary-General any information

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*Rights in East Timor: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations, 95th Cong., 1st Sess. 1 (1977);* Dunn *The East Timor Situation-Report on Talks with Timorese Refugees in Portugal*, 7 J. CONTEMP. ASIA 409 (1977) (this and other articles prepared by Mr. Dunn, the former Australian Consul in Dili, contain a wealth of information as does his book, J. DUNN, TIMOR A PEOPLE BETRAYED (1983); S. NICHTERLEIN, 1 THE STRUGGLE FOR EAST TIMOR (mimeo, 1978) (on file with the author); S. NICHTERLEIN, 2 THE STRUGGLE FOR EAST TIMOR (mimeo. 1979) (on file with the author); Hoadley, *East Timor: Civil War—Causes and Consequences*, 1976 SOUTHEAST ASIA AFF. 411; Hoadley, *Indonesia's Annexation of East Timor; Political, Administrative and Developmental Initiatives*, 1977 SOUTHEAST ASIA AFF. 133; S. ROFF, TIMOR'S ANSCHLUSS: INDONESIAN AND AUSTRALIAN FOREIGN POLICY IN EAST TIMOR 1974-1976 (1992). For a useful compilation of research materials on East Timor, *see* K. SHERLOCK, A BIBLIOGRAPHY OF TIMOR (1980). For additional discussion of the legal issues included in the East Timor dispute, *see* P. ESCARAMEIA, FORMATION OF CONCEPTS IN INTERNATIONAL LAW: SUBSUMPTION UNDER SELF-DETERMINATION IN THE CASE OF EAST TIMOR, (unpublished J.S.D. thesis, Harvard University, 1988); Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U.J. INT'L & POL. 331 (1976); Elliot, *The East Timor Dispute*, 27 INT'L & COMP. L.Q. 238 (1978); Suter, *International Law and East Timor*, 5 DYASON HOUSE PAPERS, No.2 (1978).

In addition to Indonesia's violation of the norms regarding self-determination and aggression in entering and occupying East Timor, the invasion and occupation arguably involved further illegalities, including breaches of the law of war, human rights violations, and genocide. *See* Session of the Permanent People's Tribunal on East Timor, *reprinted in* Note verbale dated August 11, 1981 from the Permanent Representative of Cape Verde to the United Nations addressed to the Secretary-General, U.N. Doc. A/36/448, Annex at 20-21 (law of war), 21-22 (human rights), and 22 (genocide) (1981); Suter, *supra*, at 4-5 (law of armed conflicts); 35 U.N. GAOR, C.4 (9th mtg.) 9, U.N. Doc. A/C.4/35/SR.9 (1980) (statement of R. Clark) (human rights violations). On genocide, *see* Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor*, 8 Ohio N.L. Rev. 321 (1981).

[2] *See* Comment, *Portuguese Africa: A Brief History of United Nations Involvement*, 4 DEN. J. INT'L L. & POL'Y 133 (1974).

[3] U.N. CHARTER art. 73(e).

[4] 11 U.N. GAOR (656th plen. mtg.) 1143, 1149, U.N. Doc. A/PV.656 (1957). In 1951, Portugal adopted a constitutional amendment redefining Portuguese colonies, including East Timor, as "overseas provinces." However, as a report prepared for the U.N. Secretariat noted,

> [t]he *de jure* change in status in the Territories . . . was not accompanied by *de facto* changes in their government and administration. Nevertheless, the Portuguese regime persisted

regarding its territories. Motivated in part by Portugal's non-compliance, the General Assembly adopted Resolution 1541(XV),[5] delineating principles which should guide members in determining whether they are required to transmit the information required by Article 73(e) of the Charter. Principle IV of Resolution 1541(XV) provides that a *prima facie* obligation to transmit information exists when a territory is geographically separate and ethnically and/or culturally distinct from the country responsible for its administration.[6] Given the ethnic and physical differences between Portugal and its overseas territories,[7] Portugal clearly was subject to Article 73(e) reporting requirements, a point the General Assembly made when it declared Portugal responsible for transmitting information about its territories, including "Timor and dependencies."[8] Portugal, however, took the position that this declaration was beyond the authority of the General Assembly and refused to comply.[9]

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> in declaring that Portugal was a pluricontinental state and refused in consequence to take any steps towards the self-determination and independence of its overseas territories.

U.N. Dep't of Political Affairs, Trusteeship and Decolonization, *Issue on East Timor* DECOLONIZATION, Aug., 1976, at 39 [hereinafter cited as *Issue on East Timor*].

[5] G.A. Res. 1541, 15 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/4684 (1960) [hereinafter cited as G.A. Res. 1541 (XV)]. For a summary of the history behind G.A. Res. 1541(XV), *see* 1960 U.N.Y.B. 44-48.

[6] G.A. res 1541(XV), *supra* note 5. Principle IV is supplemented by Principle V, which provides that

> [o]nce it has been established that such a *prima facie* case of geographical and ethnic or cultural distinctness of a territory exists, other elements may then be brought into consideration. The additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationships between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73(e) of the Charter.

*Id.*

[7] East Timor is over 14,000 miles from Portugal. Except for a few thousand persons of Chinese, European, and mixed ancestry, most of the population is of Timorese origin. Physically, the East Timorese display a mixture of Malay and Melanesian traits. 9 ENCYCLOPEDIA BRITANNICA 1017 (1974).

[8] G.A. Res. 1542, 15 U.N. GAOR, Supp. (No. 16) 30, U.N. Doc. A/4684 (1960) [hereinafter cited as G.A. Res. 1542(XV)].

[9] 15 U.N. GAOR (948th plen. mtg.) 1285, 1293-94, U.N. Doc. A/PV.948 (1960). Portugal's argument rested on two bases. First, that U.N. Charter Chapter XI, of which Article 73(e) is part, is a mere declaration, creating no legal obligation to transmit information about non-self-governing territories. Second, that even assuming Article 73(e) prescribed a legal duty, Portugal, the administering nation, and not the General Assembly, had the sole authority to determine whether its territories fell within the scope of Article 73(e). *Id. See generally* F. NOGUERIA, THE UNITED NATIONS AND PORTUGAL (1963).

A stalemate between Portugal and the United Nations continued until April, 1974 when a new regime succeeded to power in Lisbon.[10] The new government accepted its duties under Chapter XI and adopted a constitutional amendment recognizing the Portuguese territories' right to self-determination and independence.[11] Questions remained, however, as to how, when, and under whose auspices self-determination would be accomplished. Timor was an outpost of the Portuguese Empire, and the new regime in Lisbon had neither the resources, nor apparently the will, to take bold steps towards its decolonization.

In the power vacuum created by Lisbon's abandonment of efforts to administer the decolonization of East Timor, three political parties emerged, each seeking to direct the decolonization process to different ends.[12] The Frente Revolucianaria de Timor Leste Independente (FRETILIN) wanted independence after a short transitional period; the Associacao Popular Democratica de Timor (APODETI) advocated integration with Indonesia; the Uniao Democratica de Timor (UDT) desired "progressive autonomy" but with continued Portuguese presence.[13] By 1975, FRETILIN appeared to be the leading party.[14]

Using its strong position, FRETILIN undertook diplomatic efforts to obtain support for East Timorese independence. To this end, FRETILIN sought to allay the fears of Indonesia and secure its support.[15] José Ramos Horta, the Minister for

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[10]. The Caetano regime was succeeded in April, 1974 by the Junta of National Salvation. N.Y. Times, Apr. 25, 1974, at 1, col. 3.

[11]. The amendment was adopted on July 24, 1974. *See* Report of the special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 30 U.N. GAOR, 2 Supp. (No.23) 34, U.N. Doc. A/10023/ Rev. 1 (1975). In the Fourth Committee of the General Assembly, Portuguese representatives reaffirmed their nation's recognition of its obligations under Chapter XI. 29 U.N. GAOR, C.4 (2080th mtg.) 3, 7, U.N. Doc. A/C.4/SR.2080 (1975).

[12]. For background on these parties, *see Issue on East Timor, supra* note 4, at 8-12.

[13]. *See id.* at 8.

[14]. *See* Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 11, at 35-36; 35 U.N. GAOR, C.4 (11th mtg.) 7, U.N. Doc. A/C.4/35/SR.11 (1980) (statement of E. Traube), reprinted in CULTURAL SURVIVAL, INC, EAST TIMOR 24 (1981) (FRETILIN was well on its way to enjoying wide popular support in November, 1974).

[15]. In July, 1974, FRETILIN also made diplomatic efforts to win Australian support. At that time, it failed to obtain an Australian commitment to support independence. *See Issue on East Timor, supra* note 4, at 12. Further efforts in December resulted in a public statement by Australia supporting the "right of self-determination" of the people of East Timor. *See id*; 93 AUSTL. PARL. DEB., H.R. (Hansard) 644 (1975) (referring to Australia's support for "measured and deliberate" decolonization of East Timor resulting in self-determination); Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 11, at 34.

External Affairs, assured the Indonesians that an independent East Timor under FRETILIN leadership would maintain close and friendly relations with Indonesia, and would neither support separatist movements within Indonesia nor permit such movements to use Timorese territory as a base of operations against Indonesia.[16] These demonstrations of goodwill succeeded. By letter dated June 17, 1974,[17] Indonesia stated that:

> I. The independence of every country is the right of every nation with no exception for the people in Timor.
>
> II. The government, as well as the people of Indonesia, have no intention to increase or expand their territory, or to occupy other territories other than what is stipulated in their Constitution. This reiteration is to give you a clear idea, so that there may be no doubt in the minds of the people of Timor in expressing their own wishes.[18]
>
> III. For this reason, whoever will govern in Timor in the future after independence can be assured that the Government of Indonesia will always strive to maintain good relations, friendship and cooperation for the benefit of both countries.

As concrete steps were taken towards the independence of East Timor, Indonesia's position began to change. In January, 1975, FRETILIN and UDT formed an alliance and began to negotiate with Portugal for a transitional government that would lead to independence—a goal to which UDT had also come to aspire.[19] Indonesian spokesmen thereafter began to suggest that independence was not an option available to East Timor. Comments were made about the territory's backwardness and lack of economic viability,[20] and Jakarta disseminated misinformation about the status and condition of East Timor.[21] In particular, FRETILIN was portrayed as a leftist party that planned to deliver the country to the Communists. Such an event allegedly would undermine regional security.[22]

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[16] Interview with José Ramos Horta, in New York City (Jan. 15, 1981). Indonesia is struggling with secessionist movements in West Irian, the South Moluccas, and Aceh (Northern) Sumatra. *See* N.Y. Times, Oct. 11, 1971, at A6, col. 1 (discussing South Moluccas); *Jakarta's Most Sensitive Spots*, FAR EASTERN ECON. REV., Aug. 4, 1978, at 24 (discussing West Irian and Aceh Sumatra).

[17] J. JOLLIFFE, *supra* note 1, at 66.

[18] In fact, no particular territory is stipulated in the Indonesian Constitution. *See* McBeath, *Indonesia*, in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A Blaustein & G. Flanz ed. 1990). Representatives of the Republic of Indonesia, however, have made several explicit statements denying any intent to expand into East Timor. For example, in the course of the general debate at the General Assembly's Fifteenth Session in 1960, the then foreign minister of Indonesia said,

> [w]e are declaring the right of the Indonesian people to be sovereign and independent within all the territory formerly covered by the Netherlands East Indies. We do not make any claim to nay other part of the Indonesian archipelago. Indonesia explicitly does not make any claim at all to territory such as that in Borneo or Timor which lies within the Indonesian archipelago, but was not part of the Netherlands East Indies.

15 U.N. GAOR (888th plen. mtg.) 431, 451, U.N. Doc. A/PV.888 (1960).

In 1957, in the First Committee, the Indonesian representative said, "Indonesia had no claims on any territories which had not been part of the former Netherlands East Indies. No one should suggest otherwise or advance dangerous theories in that respect." 12 U.N. GAOR, C.1 (912th mtg.) 243, 247, U.N. Doc. A/C.1/SR.912 (1957).

The alliance between UDT and FRETILIN soon began to break down, and no agreement acceptable to both parties could be reached with the Portuguese. UDT leaders were in contact with Indonesia throughout July and August of 1975, and apparently were warned that Indonesia would not tolerate an independent East Timor unless immediate steps were taken against FRETILIN and an anti-communist front was established.[23] With this tacit support, UDT seized power on August 11, 1975, and demanded immediate independence and the imprisonment of FRETILIN leaders.[24] Fighting broke out between FRETILIN and UDT.[25] The Portuguese were in no position to control the situation.[26] Large numbers of the Portuguese military deserted to FRETILIN and on August 29, the Governor and remaining Portuguese military and civilian personnel withdrew from the capital, Dili, to the nearby island of Atauro.[27] By mid-September, 1975, FRETILIN had taken control of a substantial part of the country,[28] and on November 28, 1975 it declared the independence of the "Democratic Republic of East Timor."[29] Two days later a coalition of APODETI, UDT, and two smaller parties, KOTA and Trabalhista, denounced FRETILIN's action and declared the independence and integration of East Timor with the Republic of Indonesia.[30]

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[19]. *Issue on East Timor, supra* note 4, at 14.

[20]. *Id.* at 14-15.

[21]. Nichterlein, *The Struggle for East Timor—Prelude to Invasion,* 7 J. CONTEMP. ASIA 489-90 (1977).

[22]. *Issue on East Timor, supra* note 4, at 15-16. By April, 1975, officials in the Australian Department of Foreign Affairs believed that "the Indonesians remain unshaken in their resolve that, ultimately, Portuguese Timor should become part of Indonesia." At that time, the Australians still believed that Indonesia would not invade East Timor.

> The Indonesians have assured us at all levels that they are not contemplating military intervention. There is a less strident tone to Indonesian propaganda. Latest intelligence reports reveal no preparations for early military action. The Portuguese, meanwhile, have reaffirmed their willingness to follow a very gradual time table for decolonization in Timor. This seems to be acceptable to the political groupings on the ground, as well as to the Indonesians.

Brief for Minister for Foreign Affairs, April, 1975, *reprinted in* DOCUMENTS ON AUSTRALIAN DEFENCE AND FOREIGN POLICY 1968-1975 189 (1981) [hereinafter cited as DOCUMENTS].

[23]. *Issue on East Timor, supra* note 4, at 18; N.Y. Times, Aug. 12, 1975, at A2, col. 1.

[24]. *Issue on East Timor, supra* note 4, at 19.

[25]. *See* Report on Visit to East Timor by Senator Arthur Gietzelt and Representative Ken Fry, Members of Australian Parliament (mimeo., Sept. 1975) (on file with the author); *Issue on East Timor, supra* note 4, at 19. Two to three thousand people lost their lives in the fighting between the two groups, while "thousands" crossed the frontier into Indonesian Timor to escape the war. *Id.*

[26]. Kamm, *supra* note 1, at 56.

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[27]. *Id.; Issue on East Timor, supra* note 4, at 19.

[28]. In the period between the defeat of the UDT forces and the Indonesian invasion, the FRETILIN administration succeeded in reestablishing law and order and in restoring essential services to towns in East Timor. According to J.S. Dunn, former Australian Consul-General in East Timor, FRETILIN leaders were warmly received by the Timorese people wherever they went. *Issue on East Timor, supra* note 4, at 23.

[29]. J. JOLLIFFE, *supra* note 1, at 208-15. At least two factors contributed to FRETILIN's decision to declare the independence of East Timor. First, FRETILIN leaders had been heavily influenced by the events occurring in other Portuguese territories, particularly Mozambique and Angola. Thus the decision made earlier in the month by the Movimento Popular del Libertacao de Angola (MPLA) to declare independence encouraged FRETILIN leaders to follow a similar course. A second factor in FRETILIN's decision was the deterioration of FRETILIN's diplomatic relations with Australia and Indonesia. This deterioration was reflected in a cable from the Australian Ambassador to Indonesia wherein he noted:

> We are all aware of the Australian defence interest in the Portuguese Timor situation but I wonder whether the Department has ascertained the interest of the Minister of the Department of Minerals and Energy in the Timor situation. It would seem to me that this Department might well have an interest in closing the present gap in the agreed sea border and this could be much more readily negotiated with Indonesia by closing the present gap than with Portugal or independent Portuguese Timor.
>
> I know I am recommending a pragmatic rather than a principled stand but that is what national interest and foreign policy is all about, as even those countries with ideological bases for their foreign policies, like China and the Soviet Union, have acknowledged.

Cable from the Australian Ambassador to Indonesia to the Department of Foreign Affairs (Aug. 17, 1975) *reprinted in* DOCUMENTS, *supra* note 22, at 197-200. Having lost some of its regional support, FRETILIN thought it expedient to appeal to the world community. FRETILIN reasoned that, as a political party, it carried no weight in the world political arena and could therefore only watch helplessly as the Indonesians slowly but systematically encroached upon their territory. J. JOLLIFFE, *supra* note 1, at 216. As a sovereign nation, however, it would be possible to appeal to the world community, and in particular to the U.N., for moral and material support. According to the FRETILIN Minister for External Affairs, José Ramos Horta, FRETILIN's declaration of independence was ultimately recognized by fifteen governments: Angola, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe, Albania, Benin, Cambodia, People's Republic of China, People's Republic of Congo (Brazzaville), Guinea (Conakry), Democratic Republic of Korea, Laos, Vietnam, and Tanzania. Interview with José Ramos Horta, *supra* note 16.

[30]. *Issue on East Timor, supra* note 4, at 29. for the text of this proclamation, *see* Letter dated December 4, 1975, from the Permanent Representative of Indonesia to the Secretary-General, U.N. Doc. A/C.4/808 (1975). The Portuguese Government rejected both the FRETILIN proclamation of independence and the pro-Indonesia parties' declaration of integration with Indonesia. *See* Communiqué by the Portuguese National Decolonization Commission (Nov. 27, 1975), *reprinted in* U.N. Docs. A/10403 & S/11890 (1975). Shortly after these declarations, a draft resolution was introduced in the Fourth Committee of the General Assembly. It was designed to bring all the parties together with a view towards establishing conditions that would enable the East Timorese to exercise their right to self-determination and independence in a peaceful manner and in a atmosphere of security

On December 7, 1975, Indonesian forces invaded East Timor.[31] On December 18, Adam Malik, the Foreign Minister of Indonesia, announced the establishment of a "provisional government" in East Timor.[32]

At the United Nations, both the General Assembly and the Security Council reaffirmed East Timor's right to self-determination and called for Indonesia's withdrawal from the territory.[33] The Security Council also requested the Secretary-General to send a Special Representative to assess the situation first-hand.[34] United Nations efforts proved ineffective,[35] however, and support for East Timorese

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and tranquillity, free from any threats or coercion. It also requested Portugal and all Timorese political parties to make every effort to find a peaceful solution and requested the Special Committee on Decolonization to send a fact-finding mission to the Territory as soon as possible. *See* 30 U.N. GAOR, C.4 (2180th mtg.) 356, 358, U.N. Doc. A/C.4/SR.2180 (1975). A revised version of the draft, circulated on December 6, added a paragraph affirming that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations." The revised draft also removed a paragraph that had lauded "the positive attitude of the administering Power in making every effort to find a solution by peaceful means." Draft resolution revision submitted by Australia, Fiji, Indonesia, Japan, Malaysia, Papua New Guinea, Philippines, and Thailand, U.N. Doc. A/C.4/L.1125 Rev. 1 (1975). *See* 30 U.N. GAOR, C.4 (2184th mtg.) 390, 396, U.N. Doc. A/C.4/SR.2184 (1975). In retrospect, the revision, apparently instigated by Indonesia, seems to have been calculated to set up two later Indonesian arguments: (1) that Timor was part of the national territory of Indonesia and that the "integrity" of Indonesia should be preserved, *see* note 79 *infra*, and (2) that because of the "criminal negligence" of Portugal, Indonesian intervention was justified, *see* note 161 *infra*.

[31]. Letter dated December 7, 1975 from the Permanent Representative of Portugal to the United Nations addressed to the President of the Security Council, U.N. Doc. S/11899 (1975).

[32]. J. JOLLIFFE, *supra* note 1, at 272.

[33]. On December 11, the Fourth Committee of the General Assembly adopted a resolution deploring the Indonesian invasion and calling for the withdrawal of Indonesian troops. 30 U.N. GAOR, C.4 (2188th mtg.) 407, 412, U.N. Doc. A/C.4/SR.2188 (1975). On December 12, the plenary of the General Assembly adopted a similar resolution by a vote of 72 to 10, with 43 abstentions. G.A. Res. 3485, 30 U.N. GAOR, Supp. (No. 34) 118, U.N. Doc. A/10034 (1975) [hereinafter cited as G.A. Res. 3485, (XXX)]. Of the dissenting nations, Benin rejected the resolution because it merely "deplored", rather than "categorically condemned" Indonesia's action. 30 GAOR, C.4 (2188th mtg.) 407, 409, U.N. Doc. A/C.4/SR.2188 (1975). India, Iran, Japan, Malaysia, Philippines, Quatar, Saudi Arabia, and Thailand supported Indonesia. The tenth "no" vote was cast by Indonesia. The Security Council unanimously called for the withdrawal of Indonesian forces and reaffirmed East Timor's right to self-determination. S.C. Res. 384, 30 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/Res/384 (1975) [hereinafter cited as S.C. Res. 384].

[34]. S.C. Res. 384, *supra* note 33, para. 5.

[35]. Secretary-General Waldheim appointed Vittorio Winspeare Guicciardi, Director-General of the United Nations Office at Geneva, as his Special Representative. Report of the Secretary-General in pursuance of Security Council Resolution 384, 31 U.N. SCOR, Supp. (Jan.-Mar. 1976) 119, U.N. Doc. S/12011 (1976) [hereinafter cited as Report of the Secretary-General]. Winspeare Guicciardi contacted representatives of the interested parties in New York, Australia, Jakarta, Kupong in West Timor, and in areas under the control of the "Provisional Government," including the enclave of Oecusse, the Island of Ataúro, the capital city Dili, Matuto, and Bacau on the island's north

independence eroded as time passed.[36] Indonesia moved ahead with military operations and the incorporation of East Timor into its territory.[37]

The "Provisional Government" invited the United Nations Special Committee on Decolonization, the President of the Security Council, and the Secretary-General to attend the first meeting of a "Regional Popular Assembly" in Dili on May 31, 1976.[38] The invitations were declined.[39] The meeting that took place in Dili was over in less than two hours and was witnessed by seven foreign diplomats.[40] The "Regional Popular Assembly" unanimously adopted a resolution requesting integration with Indonesia.[41] On June 7, 1976, following the meeting in Dili, a delegation of the representatives of the people of East Timor formally presented to

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coast. Attempts were made in conjunction with FRETILIN officials in Australia to visit FRETILIN-held areas, but communication and transportation difficulties, aggravated by the Australian and Indonesian governments, frustrated these attempts. *Id.* at 121; J. JOLLIFFE, *supra* note 1, at 276-77 (Australian government confiscated radio link used by Winspeare Guicciardi). Air fields suggested by FRETILIN for use by the U.N. party came under Indonesian attack, apparently in an effort to sabotage this part of the mission. Report of the Secretary-General, *supra*. As a result of these events, Winspeare Guicciardi concluded that "any accurate assessment of the situation as a whole remains elusive." *Id.* at 122.

[36]. In contrast with the December, 1975 Security Council resolution, which was adopted unanimously, the United States and Japan, in April, 1976, abstained on a resolution that reiterated the operative paragraphs of the December resolution, S.C. Res. 389, 31 U.N. SCOR, Resolutions and Decisions 18, U.N. Doc. S/Res/389 (1976). *See Issue on East Timor*, *supra* note 4, at 62-63. For subsequent General Assembly action, *see* note 48 *infra*. The decline in support for East Timorese independence resulted, in large part, from intense efforts by Indonesian diplomats to win support for their position. More than one foreign office found that its entire diplomatic relationship with Indonesia was "on the line" in this regard. (Author's conversations with officials and representatives at the United Nations).

[37]. *Issue on East Timor*, *supra* note 4, at 64.

[38]. *Id.*

[39]. *See id.;* Note by the President of the Security Council, 31 U.N. SCOR, Supp. (Apr.-June 1976) 65, U.N. Doc. S/12104 (1976); Report of the Secretary-General, *supra* note 35.

[40]. Diplomats from India, Iran, Malaysia, New Zealand, Nigeria, Saudi Arabia, and Thailand were present. *See Issue on East Timor*, *supra* note 4, at 37 n.157; Wash. Post, June 1, 1976, at A17, col. 3. Among other nations, Australia and Japan apparently declined similar invitations, and as a consequence, incurred the wrath of the Indonesians. J. JOLLIFFE, *supra* note 1, at 289. The Philippines was also apparently invited and had accepted; however, no representative of the Philippines was present. Sonpong, Report of the Thai Representative to the Popular Assembly (S. Miller trans. 1975) (on file with the author) [hereinafter cited as Report of the Thai Representative to the Popular Assembly].

[41]. *See Issue on East Timor*, *supra* note 4, at 37.

President Suharto of Indonesia a petition requesting integration.[42] On June 24, Indonesia dispatched a "fact-finding" mission to East Timor to ascertain the "wishes of the People."[43] Following a "favorable" report of this fact-finding mission, the Indonesian parliament approved a bill for the integration of East Timor into Indonesia.[44] Despite Indonesia's declared incorporation of East Timor into the Republic of Indonesia, FRETILIN military activity continued on a significant scale until 1978-79.[45] This activity continues, but at a lower level.[46]

In December, 1976, the General Assembly again called upon Indonesia to withdraw its forces and deplored its failure to comply with the previous General Assembly and Security Council resolutions.[47]It rejected the claim that East Timor had been integrated into Indonesia, declaring that the people had not been able to exercise freely their right to self-determination. Resolutions critical of the Indonesian actions were adopted in each subsequent session of the General Assembly to 1982.[48] Nevertheless, Indonesian diplomacy gradually eroded the support formerly shown for East Timor.[49]

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[42]. Letter dated June 15, 1976, from the Permanent Representative of Indonesia to the Secretary-General, 31 U.N. SCOR, Supp. (Apr.-June 1976) 60-61, U.N. Doc. S/12097, Annex II (1976).

[43]. *Issue on East Timor, supra* note 4, at 38. Foreign diplomats and members of the press were also present during the mission's visit. INDONESIA DEP'T OF INFORMATION, PROCESS OF DECOLONIZATION IN EAST TIMOR 38 (1976).

[44]. N.Y. Times, July 18, 1976, at A7, col. 1. For an unofficial translation of this bill, *see* INDONESIA DEP'T OF FOREIGN AFFAIRS, DECOLONIZATION IN EAST TIMOR, Annex XIII (1976).

[45]. *See* Kamm, *supra* note 1, at 62.

[46]. *See, e.g.*, Branigan, *Rebel Leader's Capture Unlikely to End Jakarta's Timor Woes*, Wash. Post, December 19, 1992.

[47]. G.A. Res 31/53, 31 U.N. GAOR, Supp. (No. 39) 125, U.N. Doc. A/31/39 (1976).

[48]. G.A. Res. 32/24, 32 U.N. GAOR, Supp. (No. 45) 169, U.N. Doc. A/32/45 (1977); G.A. Res. 33/39, 33 U.N. GAOR, Supp. (No. 45) 181, U.N. Doc. A/33/45 (1978); G.A Res. 34/40, 34 U.N. GAOR, Supp. (No. 46) 206, U.N. Doc. A/34/46 (1979); G.A. Res. 35/27, 35 U.N. GAOR, Supp. (No. 48) 219, U.N. Doc. A/35/48 (1980); G.A. Res. 36/50, 36 U.N. GAOR, Supp. (No. 51) 200, U.N. Doc. A/36/51 (1981); G.A. Res. 32/30, 37 U.N. GAOR, Supp. (No. 51) 227, U.N. Doc. A/37/51 (1982).

[49]. Since 1983, the East Timor item has appeared annually on the agenda of the General Assemby. No actual debate has, hoever, taken place, but the mandate of the Secretary-General to bring the parties together has continued--with little tangible to show for it. The matter is still debated each year in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. It is also debated in the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities.

## II. Self-Determination and East Timor

The Indonesian invasion and occupation of East Timor violate two fundamental norms of international law. First, Indonesia's actions deprived East Timor of its right to self-determination. Second, military intervention into East Timor constituted an act of aggression forbidden by the United Nations Charter and customary law. The United nations itself deplored the invasion and called for the withdrawal of Indonesian troops.[50]

Indonesia has denied that its acts are invalid. But defenses asserted explicitly, as well as those suggested in Indonesia's public statements, fail adequately to rebut charges that it has violated the principle of self-determination and engaged in unjustifiable and illegal acts of aggression.[51]

Indonesia has offered three explanations of its efforts to integrate East Timor in terms of self-determination. First, Indonesia has argued that integration with Indonesia is the will of the East Timorese people and thus constitutes self-determination. Second, Indonesia has suggested that, regardless of any explicit consent to integration, the historical, ethnic, cultural, and geographical ties between Indonesia and East Timor established East Timor as an integral part of the Indonesian archipelago. If one accepts this proposition, administration of East Timor by any authority other than Indonesia violates Indonesia's territorial integrity and conflicts with United Nations doctrine. Finally, Indonesia has argued that East Timor is not economically viable and requires direction and assistance from an economically stable state before it can be expected to survive as an independent state.

None of these defenses withstands scrutiny. Reviewing each argument merely underscores the illegality of Indonesia's actions.

### A. *East Timorese "Expressions of Will"*

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[50] G.A. Res. 3485, 30 U.N. GAOR, Supp. (No. 34) 118, U.N. Doc. A/10426 (1975); S.C. Res. 384, *supra* note 33; S.C. Res. 389, 30 U.N. SCOR, Resolutions and Decisions 18, U.N. Doc. S/Res/389 (1975).

[51] Indonesia has not made a comprehensive legal case for its actions. Its positions have been gleaned mainly from the statements of its representatives in the General Assembly and the Security Council and from four Indonesian publications: INDONESIA DEP'T OF INFORMATION, PROCESS OF DECOLONIZATION IN EAST TIMOR (1976); INDONESIA DEP'T OF FOREIGN AFFAIRS, DECOLONIZATION IN EAST TIMOR (1976); Nahar, *Some Historical Notes on Timor Island*, INDONESIAN NEWS AND VIEWS, Nov. 8, 1975 at 1; 20 INDONESIAN NEWS, Special Issue, EAST TIMOR: DE-BUNKING [sic.] THE MYTHS AROUND A PROCESS OF DECOLONIZATION, (Remarks by Foreign Minister Ali Alatas, 20 February 1992.) The author is indebted to Mr. Juwana of the Indonesian Mission to the United Nations for providing him in 1981 with information on the Indonesian point of view.

United Nations doctrine recognizes that non-self governing territories have the right to self-determination.[52] That right entitles each territory to choose the status it will assume on completing decolonization.[53] General Assembly resolutions recognize that territories have at least three alternatives: emergence as a sovereign state, free association with an independent state, or integration with a sovereign state.[54]

Indonesia contends that it did not deprive East Timor of self-determination because, by four acts, the East Timorese people indicated their preference for integration with Indonesia. The four acts include the November, 1975 Proclamation by four parties sympathetic to union with Indonesia,[55] the May, 1976 resolution of the East Timor "Regional Popular Assembly,"[56] the subsequent petition to the

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[52] Self-determination is recognized as a fundamental international norm in the Charter of the United Nations. *See* U.N. CHARTER arts. 1, 55, 56. International law has recognized that the principle of self-determination applies to all non-self-governing territories. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1974] I.C.J. 16, 31. The Advisory Opinion on Western Sahara defended the universality of the principle of self-determination, despite the fact that:

> in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.

Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 33.

The principle of self-determination has been defined as "the need to pay regard to the freely expressed will of peoples." *Id. See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16), 66, U.N. Doc. A/4684 (1960) [hereinafter cited as G.A. Res. 1514(XV)]; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970). For a general discussion of the right of self-determination, *see* R. EMERSON, SELF-DETERMINATION REVISITED IN AN ERA OF DECOLONIZATION (1964); A. RIGO-SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973); C. TOUSSAINT, THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS (1956); SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (Y. Alexander & R. Friedlander eds. 1980); Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Reisman & B. Weston eds. 1976).

[53] Self-determination has been identified as a right of all peoples and as a means to bring colonial situations to a speedy conclusion. *See* G.A. Res. 1514 (XV), *supra* note 52; Advisory Opinion on Western Sahara [1975] I.C.J. 12, 32.

[54] These alternatives may not exhaust the possibilities available to territories. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, 124, U.N. Doc. A/8082 (1970) (accepting as valid alternative "any other political status freely determined by a people").

[55] *See* text accompanying note 30 *supra*.

[56] *See* text accompanying note 41 *supra*.

Indonesian president and parliament,[57] and the Indonesian fact-finding mission of June, 1976.[58]

None of these acts satisfies the conditions set forth by the General Assembly for a legitimate and genuine expression of will to integrate with a sovereign state. Principle IX of G.A. Resolution 1541(XV) provides that:

> (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes.
> (b) The integration should be the result of the freely expressed wishes of the Territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.[59]

Two of the four acts do not even pretend to satisfy Principle IX. Neither the November, 1975 proclamation issued by the coalition of four parties, nor the June, 1976 fact-finding mission resembled in any way the plebiscite required by Principle IX.

The remaining two acts cited by Indonesia, the East Timor Popular Assembly and the subsequent petition to Indonesia presented by delegates of the representatives of East Timor, did pay at least lip service to the spirit of Principle IX.[60] On review, however, they also prove inadequate. Contrary to Principle IX, the representatives to the Regional Popular Assembly were not elected by a process respecting universal adult suffrage. In any event the election was not impartially conducted. There is no evidence that the people of East Timor understood the consequences of the available choices, and little evidence to suggest that East Timor had achieved that stage of self-government necessary for a people to shape its destiny. As the Regional Popular Assembly was unlawfully chosen, the petition it subsequently presented to Indonesia was also unlawful.

### 1. *"Universal Adult Suffrage"*

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[57] *See* text accompanying note 42 *supra.*

[58] *See* text accompanying notes 43-44 *supra.*

[59] G.A. Res. 1541 (XV), *supra* note 5.

[60] *See Issue in East Timor, supra* note 4, at 37.

A law passed by the "Deliberative Council of East Timor," a body created at the same time as the "Provisional Government of East Timor," established the formalities for convening the Regional Popular Assembly.[61] The Act provided that the Regional Popular Assembly be composed of the "Deliberative Council of East Timor," supplemented by representatives from each of the thirteen *Conselhos* or districts of East Timor. In each district, a Popular Assembly was to be formed that would choose the district's two or three representatives to the Regional Assembly.[62]

Even if the Regional Popular Assembly was designed to represent the will of the East Timorese people, it fell far short of satisfying the standards of Principle IX. First, representatives to the Regional Assembly were not elected according to the principle of universal adult suffrage. Rather, the Act provided that"[s]olely in the capital City of Dili representatives for the *Conselho* Popular Assemblies and the Regional Popular Assembly will be elected in accordance with the [principle of] one man/one vote." In the other districts representatives to the *Conselhos* Popular Assemblies were to be chosen in accordance with the tradition and identity of the people of East Timor, meaning a representative system by means of "consensus and consent."[63] As a result, only five of twenty-eight representatives to the "Regional Popular Assembly" were elected by popular vote.[64]

The absence of a public record of the proceedings makes it particularly difficult to determine who in fact participated in the elections and whether district elections represented the will of the people. It has, indeed, been asserted that only five of the twenty-eight delegates who participated in the proceedings were actually elected.[65]

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[61]. Act No. 1/A.D. 1976 of the "Provisional Government of East Timor", *reprinted in* Report of the Secretary-General pursuant to Security Council Resolution 389 (1976), 31 U.N. SCOR, Supp. (Apr.-June 1976) 66, U.N. Doc S/12106, Appendix (1976) [hereinafter cited as Act No. 1/A.D. 1976]

[62]. *Id.* For a description of the Portuguese administrative structure, which introduced the system of the thirteen Conselhos, *see* Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 22 U.N. GAOR, I Annex (Agenda item 23) 59, U.N. Doc. A/6700/Rev. 1 (1967).

[63]. Act No. 1/A.D. 1976, *supra* note 61, arts. 2,5. What the law meant by "consensus and consent," which must refer to something other than one person, one vote, is unclear and remains unexplained. The law apparently envisaged some form of consultation of traditional leaders, but the nature and extent of any such consultation has not been revealed. An anecdotal story told to the author had at least one representative simply hauled off the street in Dili.

[64]. It might be suggested that conditions in East Timor were such that a consultation based on one person, one vote could not have been achieved within a reasonable period of time after the 1974 Portuguese change of government. However, it should be noted that in cases where a status other than independence was considered by the United Nations, an expression of will has almost invariably been ascertained by an election or referendum conducted on this basis—regardless of how difficult conditions might have made efforts to conduct such a vote. For a discussion of examples of such referenda, *see* note 67 *infra* (British Togoland, Northern Cameroons, Southern Cameroons) and note 75 *infra* (Cook Islands, Niue, Mariana Islands, Papua New Guinea).

### 2. *"Processes Impartially Conducted"*

It is also doubtful that the Regional Popular Assembly itself was conducted impartially, as is implicit in Principle IX. Although Principle IX does not require United Nations observation of a consultation, the United Nations, in fact, has a long history of involvement in consultations with populations, and has provided some assurance of the impartiality of the electoral process.[66] The United Nations, however, declined to supervise the East Timor consultation, and the observers that were present were diplomats from states arguably sympathetic to Indonesia.[67] In

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[65]. ROFF, *supra* note 1, at 127.

[66]. The United Nations has regularly supervised plebiscites leading to integration of former colonies with independent states. It supervised plebiscites that lead to the union of British Togoland with the Gold Coast to form Ghana in 1956, the Northern Cameroons with Nigeria in 1961, and the Southern Cameroons with the Cameroun Republic in 1961. U.N. Dep't of Political Affairs, Trusteeship and Decolonization, *Fifteen Years of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples,* DECOLONIZATION, Dec., 1975, at 19 [hereinafter cited as *Fifteen Years*]. Although United Nations involvement in an alleged act of self-determination generally contributes to the legitimacy and impartiality of the proceeding, the U.N.'s participation in the West Irian "act of free choice" resulting in integration with Indonesia represents a stain on the U.N.'s record. The U.N. acquiesced in a consultation that did not recognize the principle of one person, one vote. Moreover, the consultation effectively was conducted by Indonesia which "exercised at all times a tight political control over the population." Report of the Secretary-General Regarding the Act of Self-Determination in West Irian. 24 U.N. GAOR, 2 Annexes (Agenda Item 98) 2, at 20. U.N. Doc. A/7723, Annex 1 (1969). While the General Assembly did not specifically approve the result of the "act of free choice," it passed a resolution taking note of this act. *See* G.A. Res. 2504, 24 U.N. GAOR, Supp. (No. 30) 3, U.N. Doc. A/7630 (1969). This resolution, effectively washing the organization's hands of the matter, passed by a vote of 84-0, with 30 abstentions. 24 U.N. GAOR. (1813th mtg.) 1, at 17, U.N. Doc. A/PV. 1813 (1969).

[67]. *See* note 40 *supra* (list of nations that sent observers). India, Iran, Malaysia, Saudi Arabia, and Thailand all voted in support of Indonesia. New Zealand abstained. Of the seven states that had sent representatives to the "Popular Assembly," only Nigeria voted for the resolution. *See* G.A. Res 3485 (XXX), *supra* note 33. Nigeria abstained in General Assembly votes on the subject after 1978. Since 1979, New Zealand, on the other hand, has voted with Indonesia.

Several factors may explain this pattern of voting. Iran and Saudi Arabia apparently have cast their votes to support a fellow Islamic state or OPEC member. While Nigeria can be similarly described, its performance in the General Assembly indicates a continuing sentiment in favor of genuine self-determination for East Timor. This sentiment is perhaps a reflection of Nigeria's own colonial experience. Malaysia and Thailand, like Indonesia, are members of the Association of South East Asian States (ASEAN). (The other two ASEAN members, the Philippines and Singapore, have also supported Indonesia, the Philippines with some enthusiasm. The Philippines had accepted an invitation to attend the meeting in Dili but its representative did not arrive). Since Britain entered the European Economic Community, an action that resulted in New Zealand's losing a substantial portion of the British market for agricultural goods, New Zealand has made a substantial effort to convince South East Asian states that it has a significant stake in the area. While Indonesia does not conduct substantial trade with New Zealand, as the largest ASEAN member, it is perceived by New Zealand to be the key to New Zealand's diplomacy in the area. India was perhaps still grateful to Indonesia for its diplomatic support at the time of India's invasion any event, the conditions under which the diplomats observed the Assembly left them little opportunity to observe. Neither the diplomats nor attending journalists were permitted to interview members of the Assembly.[68] Moreover, because the speeches were delivered in Portuguese, many of the diplomats and journalists were unable to understand them.[69] The fact that the reports of none of the observers were made public at the time casts further doubt on what role, if any but a cosmetic one, the diplomats were expected to play and were able to play.[70]

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of Goa in 1961. It may also have been embarrassed by the way it had absorbed its protectorate, Sikkim, in 1974-75, and saw some similarities between that action and the Indonesian incorporation of East Timor.

[68]. The Times (London). June 1, 1976, at 6, col. 1. Wash. Post, June 1, 1976, at A17, col. 3.

[69]. *See* Letter from the New Zealand Minister of Foreign Affairs to Roger Clark (May 15, 1981) (on file with the author; Cable, from Jakarta to Wellington, 1 June 1976 (released under Freedom of Information Act, N.Z.) (on file with the author).

[70]. The role of the United Nations or other observer group in an act of self-determination is to ensure impartiality and fairness. The failure of the seven diplomats at the Popular Assembly to make public reports contrasts sharply with the practice of United Nations observers, *see supra* note 66, and with the observers at the 1980 Zimbabwe elections who published their reports, *see* 1980 KEESING'S CONTEMPORARY ARCHIVES 30373.

The author endeavored early in 1981, to obtain copies of the reports from each of the seven governments. The Thai Mission to the United Nations kindly transmitted a four-page report (in Thai). The report is a factual account of events and is somewhat critical of the haste with which the Assembly was convened and of the absence of its consideration of any alternative other than integration with Indonesia. *See* Report of the Thai Representative to the Popular Assembly, *supra* note 40. The New Zealand Minister of Foreign Affairs wrote:

> While I am not prepared to release the full text of the report—which was a confidential report to the New Zealand Government—I have no objection to letting you know the gist of the document.
>
> In short, while the observer's assessment was that the Council in a "serious, business-like and formal way" unanimously endorsed integration with Indonesia, the occasion left a number of unanswered questions surrounding the self-determination process in East Timor. Subsequent to this event, the New Zealand Government continued to press Indonesia, as a fellow member of the United Nations, to do what it could to get the United Nations involved in the self-determination process.
>
> You raise the question of the language in which the proceedings took place. The proceedings were in Portuguese and apparently only some parts of it were translated into English. Our observer does not speak Portuguese but make an informal arrangement to have a "running commentary" provided by a Timorese. This was, however, very much a second best to being provided with a full and accurate translation.

Letter from the New Zealand Minister of Foreign Affairs to Roger Clark (May 15, 1981) (on file with the author). The Report was later made public, supra note 69.

The Counsellor to the Indian Mission to the United Nations wrote:

> Regrettably, we are unable to send you a copy of the Ambassador's report as it is a confidential document which has not yet been released to the public. But it might be of interest to you to know that our Ambassador felt that since the village chiefs attended the Assembly, there was obviously consensus among the people of East Timor in favour of integration with Indonesia.

Letter from the Counsellor to the Indian Mission to the United Nations to Roger Clark (Jan. 29, 1981) (on file with the author).

The Chargé d'Affaires of Saudi Arabia reported, "I am sorry to inform you that the gentleman in question was unable to present a report to the Government due to the fact that he died of a heart attack four days after the meeting mentioned in your letter." Letter from the Chargé d'Affaires of Saudi Arabia to Roger

The absence of effective third party supervision of their Regional Assembly is particularly troublesome in view of the many reasons to suspect that the entire process was a sham conducted either by the Indonesians themselves, or by factions under their influence. The Assembly was conducted under the auspices of the "Deliberative Council of East Timor,"[71] which insisted on speedy proceedings.[72] Even if the Council and the Assembly were not controlled by the Indonesian government, there is every reason to believe both were composed of people sympathetic to integration with Indonesia.[73] In any event, it cannot be said with conviction that the consultation was impartially conducted; integration was the only item on the Assembly's agenda and no other alternatives appear to have been debated.[74]

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Clark (Jan 22, 1981) (on file with the author). No substantive replies were received from the other governments involved.

[71]. No explanation of the origin of the Deliberative Council, sometimes referred to as the Advisory Council, appears in the various documents forwarded to the Secretary-General by Indonesia, or in the Report of the Secretary-General pursuant to Security Council Resolution 389, 31 U.N. SCOR, Supp. (Apr.-June 1976) 66, U.N. Doc. S/12106 (1976). In remarks to the Security Council in April, 1976, Mr. Guilherme Goncalves, Chairman of the Advisory Council of the "Provisional Government," stated that the Council was established to help the "Provisional Government" in reaching "important decisions," and was to function as a provisional assembly pending the appointment of the People's Assembly. 31 U.N. SCOR (1908th mtg.) 71, U.N. Doc. A/PV. 1908 (1976). Because there is no reference in any source to an election for the Council, its members were presumably "appointed." Whether it adopted any laws other than Act No. 1/A.D. 1976, *supra* note 61, is not known.

[72]. The Assembly completed its business in under two hours, so any debate by necessity would have been brief. Wash. Post, June 1, 1976, at A17, col. 3.

[73]. *Id.;* the Times (London), June 1, 1976, at 6, col. 1.

[74]. No U.N. or neutral third-party observers were present for the selection of the representatives to the Assembly. The observers present at the actual meeting of the Assembly itself were not able to determine the representativeness of the proceedings. Wash. Post, June 1, 1976, at A17, col. 3. *See* text accompanying notes 68-70 *supra*. Moreover, the armed conflict in East Timor—whatever its origin and nature—with its resulting dislocation and starvation, reduced the ability of the East Timorese fully to exercise their right to self-determination according to the intent of G.A. Res. 1514(XV), *supra* note 52. *See* Kamm, *supra* note 1; Anderson, *supra* note 1.

It is instructive to contrast the formation and actions of the "Deliberative Council" and the Regional Popular Assembly with other exercises of the right of self-determination. The United Nations has a long history of involvement with consultations of population prior to an act of self-determination. *See Fifteen Years, supra* note 66, at 19-22. In cases where a status other than independence was considered, an election or referendum conducted on the basis of one person, one vote has been the usual practice—no matter how difficult to achieve, given the level of development of the society concerned. *See. e.g.*, Report of the United Nations Special Representative for the Supervision of the Elections in the Cook Islands, U.N. Doc. A/AC.109/L.288 (1965); Report of the United Nations Special Mission to Observe the Act of Self-Determination in Niue, U.N. Doc. A/AC 109/L.982 (1974); Report of the United Nations Special Mission to Observe the Plebiscite in the Mariana Islands District. Trust Territory of the Pacific Islands, June 1975. 43 U.N. TCOR. Supp. (No. 2) 27-30, 41, U.N. Doc. T/1771 (1976). Because the General Assembly regarded East Timor as also subject to Chapter XI of the Charter, the precedents of such elections or referenda should have applied.

Furthermore, any argument that conditions in East Timor could not have permitted a consultation based on one

### 3. *"Full Knowledge"*

Principle IX also provides that the Territory's peoples should make a responsible choice with "full knowledge of the change in their status." The United Nations has normally insisted that authorities undertake an educational campaign fully and fairly presenting the relevant issues. There is no record that such a campaign was launched. Nor is there any evidence to suggest that the East Timorese people were well-informed about or had any access to information regarding the consequences of integration with Indonesia. That the consultation and designation of representatives took place during the Indonesian occupation and continuing fighting suggests that, at best, the people were acting under circumstances unlikely to foster an informed and responsible choice.[75]

### 4. *"Advanced State of Self-Government"*

For similar reasons, it is unlikely that the consultation with the East Timorese people satisfied the provision of Principle IX declaring that the "territory should have [already] attained an advanced stage of self-government with free political institutions." It can hardly be said that the Portuguese did much to put the Territory in such a state.[76] Arguably, during its *de facto* control of the country from September to December, 1975, and possibly during the earlier period of its coalition with UDT, FRETILIN had facilitated East Timor's advancement toward self-government. But whatever success FRETILIN had was certainly destroyed by the Indonesian invasion.

In view of the deficiencies of the four acts said to express the will of the East Timorese people and the non-compliance with Principle IX, the U.N. refused to recognize that the East Timorese had exercised self-determination. Indonesia's reliance on these four events as genuine acts of will proved unacceptable to most States. Consequently its invasion and occupation of East Timor, as well as its formal declaration of integration, must be judged grave violations of East Timor's right to self-determination.

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person, one vote within a reasonable time after the Portuguese change of government in 1974 must be viewed in the light of Australia's success at organizing such elections in Papua New Guinea since 1964. J. RYAN, THE HOT LAND 371 (1969). Conditions in Papua New Guinea in 1964 were roughly comparable to those in East Timor ten years later—at least prior to the Indonesian invasion. The United Nations observed one of the Papua New Guinea elections in 1972 and went to great length to commend the thoroughness and fairness with which it had been conducted. Report of the United Nations Visiting Mission to Observe the Elections to the Papua New Guinea House of Assembly in 1972, 39 U.N. TCOR, Supp. (No. 2) 33-38, U.N. Doc. T/1739 (1972).

[75]. *See* text accompanying notes 31-42 *supra*.

[76]. *See* text accompanying note 27 *supra*.

### B. *"Historic, Ethnic, and Cultural Ties" Between Indonesia and East Timor*

Indonesia has made several statements appealing to the geographic, historic, ethnic, and cultural ties uniting it with East Timor. All of them suggest that East Timor is an integral part of the Indonesian nation. Though Indonesia has not explicitly relied upon these observations to defend its invasion of East Timor, it used similar arguments to justify its integration of West Irian.

Shortly before the Indonesian invasion, the Indonesian representative to the Fourth Committee, while defending Indonesia's interest in the peace and stability of East Timor, pointed out the geographical, cultural, and ethnic ties between Portuguese or East Timor and Indonesian Timor:

> The 450 years of division resulting from colonial domination had not diminished the close ties of blood and culture between the people of the Territory and their kin in Indonesian Timor. That geographical proximity and ethical [*sic*] kinship were important reasons for Indonesia's concern about peace and stability in Portuguese Timor, not only in its own interest, but also in the interest of Southeast Asia as a whole.[77]

The President of Indonesia forcefully made this geographic and ethnic argument at the time of the incorporation of East Timor into Indonesia. On that occasion, he emphasized historical connections with East Timor.

> This archipelago was once united, with an area approximately the size of the present territory of the unitary State of the Republic of Indonesia. History noted the famous Srivijaya Kingdom, as well as the well-known Majapahit Kingdom.
>
> But history should also note an inglorious chapter and a misfortune that befell us. For three and a half centuries we were a colonialized nation, our soul was oppressed and our body exploited. As I have mentioned earlier, we were separated from our own brothers, we were splintered into small groups. But the heritage of sharing one common destiny had never disappeared. The spirit to become independent had never been quenched.[78]

The symbolic appeal of the ancient empires of Srivijaya and Majapahit has proved to be an extremely powerful rhetorical device in the hands of Indonesian leaders. It was used in 1945 when President Sukarno first spoke in favor of uniting within an independent Indonesia the territories it allegedly controlled at the time of the Srivijaya and Majapahit kingdoms. He contended then that a fully restored Indonesian nation would include East Timor.[79] The case is a weak one. The exact extent of the Srivijaya and Majapahit empires, and their legal ties to the outlying part of the Indonesian archipelago, including Timor, are lost in history.[80] If anything, the ethnic and cultural roots of the East Timorese people and the Indonesians suggest that they are distinct peoples.[81] Moreover, any attempt on the

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[77]. 30 U.N. GAOR, C.4 (2180th mtg.) 359, U.N. Doc. A/C.4/SR. 2180 (1975).

[78]. Statement by President Suharto in response to the address presented by the delegation of the Provisional Government of East Timor, *reprinted in* 31 U.N. SCOR, Supp. (Apr.-June 1976) 62-64, U.N. Doc. S/12097, Annex V (1976).

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[79]. Srivijaya and Majapahit were recalled by Sukarno in his famous *Pantja Sila* (Five Principles) Speech of June 1, 1945, in which he asserted that "the national state is only Indonesia in its entirety, which existed at the time of Srivijaya and Majapahit, and which now, too, we must set up together." B. GRANT, INDONESIA 30 (1967). However, no claim was made to East Timor at the time of the formal declaration of Indonesian independence in August, 1945, and any aspirations for its incorporation were expressly disavowed by Indonesia in the 1950s and 60s, *see* note 18 *supra.*

[80]. The most explicit expression of the "ethnic ties" argument appears in a November, 1975 press release from the Indonesian Embassy in Washington. *See* Nahar *supra* note 51. It makes the point that Timor is geographically part of the Indonesian archipelago. It then argues that "[e]thnically, the people living in their Portuguese controlled part of the island of Timor (East Timor) are the same as the people of Indonesia. . . ." *Id.* at 1. The statement maintains that, in the past, Timor was under the administration of the Srivijaya and Majapahit empires.

The Buddhist kingdom of Srivijaya, established in Sumatra in the seventh century, was the first important political unit with connections throughout the Indonesian archipelago. Timor, however, is not mentioned among the vassals of Srivijaya in the leading work in English, G. COEDES, THE INDIANIZED STATES OF SOUTHEAST ASIA (1968). At its zenith the empire may have extended only to the western part of Java. *See* G. COEDES, THE MAKING OF SOUTHEAST ASIA 95 (1967). One commentator has characterized Srivijaya as a federation of trading ports on the Sumatran coast and important islands off the coast. O. WOLTERS, FALL OF SRIVIJAYA IN MALAY HISTORY 9 (1970). An earlier work by the same author, O. WOLTERS, EARLY INDONESIAN COMMERCE (1967), deals with the origin of the empire but does not in any way clarify the position of Timor with respect to it. In any event, by the thirteenth century its power had waned and the focus of political power shifted to Java with the establishment of the Hindu kingdom of Majapahit in 1292.

Scholarly literature discussing the ancient Indonesian empires supports at best a tenuous tributary relationship between Timor and the Majapahit empire. That empire included most of the area which later became the Dutch East Indies. G. COEDES, THE INDIANIZED STATES OF SOUTHEAST ASIA 239-40 (1968). Writings from the period suggest that Timor sent tribute to the Majapahit court. *See* B. GRANT, *supra* note 79, at 8; 4 T. PIEGEAUD, JAVA IN THE FOURTEENTH CENTURY 29-35 (1962). Piegeaud, however, considers it doubtful that Majapahit authority was at any time of much consequence in mist of the areas mentioned by the ancient writers and notes that the writers' knowledge of geography seems uneven. *Id.* Majapahit lasted for about two centuries before disintegrating with the arrival of Islam and, later, the western colonialists. INDONESIA: THE SUKARNO YEARS 3 (H. Kosut ed. 1976). Thus, even if the two kingdoms extended so far as to Timor, these ties were crumbling before the first Portuguese made contact with the island in 1512 and certainly were in abeyance before the first serious colonization effort by the Dutch in 1651. *Issue on East Timor*, *supra* note 4, at 6. References to the two ancient empires were also made in arguments concerning the inclusion of West Irian in Indonesia and during the "confrontation" with Malaysia over the inclusion of North Borneo and Sarawak in that country. *See* ROFF, *supra* note 1, at 22.

[81]. So far as the geographic proximity of Timor to the rest of the Indonesian Archipelago is concerned, no one has suggested seriously that the post-colonial world must be a "tidy" one and no claim based solely on geographic contiguity has ever been given the slightest countenance by the United Nations.

On the facts, the ethnic similarity argument carries little weight. The heart of Indonesian Republic is Java and part of Indonesia to defend its invasion on the basis of its historical ties to East Timor is in direct conflict with its own prior denials of any intent to claim East Timor as its rightful territory.[82]

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Sumatra. The Timorese probably have more in common with the Melanesians of Papua New Guinea in terms of racial characteristics and language than they do with the Javanese and Sumatrans. Mr. Ramos Horta stressed this argument before the Security Council, 31 U.N. SCOR (1908th mtg.) 23, U.N. Doc. S/PV. 1908 (1976). East Timor does, of course, have ethnic ties with West Timor as well as Molucca and West Irian, all areas encompassed by the Indonesian Republic. All of these areas, however, are on the outer fringes of Indonesia and their ethnic ties with the heartland of the Republic hardly seem of such importance as to eclipse the right of the East Timorese to determine their own status. If, theoretically, the ethnic linkage is as strong and important as Indonesia seems to think, an exercise in self-determination by the East Timorese would result in a vote a join their "brothers" as a part of the Indonesian Republic. Moreover, any ties which may have existed in the fifteenth century have certainly become much weaker today. This would occur not merely through the inevitable passage of time, but also through impact of four hundred years of colonial administration by various Western powers, the Portuguese and the Dutch, themselves very different.

[82]. *See* text accompanying notes 17-18 *supra*. In addition to undercutting the geographic, ethnic, and historical case, Indonesia's previous statements arguably support a further substantive argument against its actions. Previous decisions of the I.C.J. indicate that in certain circumstances states may be bound by "unilateral declarations." In the Legal Status of Eastern Greenland, [1933] P.C.I.J. ser. A/B, No. 53, it was held that Norway was bound by a declaration of its Foreign Minister, made in the context of negotiations with Denmark, that "the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland . . . would meet with no difficulties on the part of Norway." *Id.* at 58. Later steps by Norway to occupy parts of Greenland accordingly were held to be "unlawful and invalid." *Id.* at 75. Even if the declaration did not constitute a definitive recognition of Danish sovereignty over Greenland, it did constitute an obligation on the part of Norway to refrain from contesting Danish sovereignty over Greenland. The doctrine of the Eastern Greenland Case was carried somewhat further by a bare majority of the Court in the Nuclear Test Cases, Australia v. France, [1974] I.C.J. 253, 267-68; New Zealand v. France, [1974] I.C.J. 457, 472-73. The French Government, in a series of statements, announced its intention to discontinue atmospheric testing in the Pacific. These statements had not been made specifically in the course of diplomatic negotiations with the Applicant States, Australia and New Zealand. Nevertheless, the Court held that they were binding on the French Government.

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

[1974] I.C.J. at 267; [1974] I.C.J. at 472.

What is meant in these cases by the manifestation of an intent to be bound is obscure, but the Indonesian statements appear to show as much intent as the statement in these cases. The Malik statement to Ramos Horta is similar to the statement of the Norwegian Foreign Minister in that it was made in a "diplomatic" setting with Ramos Horta. It is distinguishable from the statement, however, in that it was not made to a representative of a government. FRETILIN would no doubt argue that Ramos Horta was the representative of a "people" at the relevant time and that this should be sufficient. Indonesia's other statements are similar to statements of the French government and thus could be relied upon by the world at large including FRETILIN and the people of East Timor.

### 1. *"Legal" Bases of Indonesian Claims; The Western Sahara Opinion*

Indonesia's arguments are rooted in dubious history. Indonesia, moreover, never fully articulated the significance of the historical origins allegedly shared by East Timor and the rest of the Indonesian archipelago. Quite possibly, Indonesia had in mind the argument that for certain former colonial territories, self-determination is synonymous with reincorporation into the greater entity of which it was a part before the colonial occupation.[83] This attitude arguably derives from the events surrounding the *Western Sahara* Opinion and paragraph six of General Assembly Resolution 1514(XV),[84] but in fact, they do not provide support for Indonesia's position.

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The binding effect of the Indonesian statements was espoused in the June, 1981 decision of the Permanent Peoples' Tribunal sitting in Lisbon. *See* Session of the Permanent People's Tribunal on East Timor, *supra* note 1, at 16 (citing the Nuclear Tests Case). *But see* Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM J. INT'L L. 1 (1977) (expressing some skepticism about the doctrinal basis of the Court's analysis of the unilateral declaration rule, especially as formulated in the Nuclear Tests Case). *See generally* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 637-40 (4th ed. 1990).

[83]. Assertions of a precolonial right to colonized territories have been advanced with some success by India and China. India used such an argument to defend its armed seizure of Portuguese territories (Goa, Damao, and Diu) in December, 1961. *See* Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617 (1962). India also argued that it was necessary to act to deal with disturbances within Goa and to respond to Portuguese border incursions. N.Y. Times, Dec. 19, 1961, at 14, col. 3. *See* note 88 *infra.*

Shortly after the government of the People's Republic assumed the Chinese seat at the United Nations, its representative wrote to the Chairman of the Special Committee With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples:

> As is known to all, the questions of Hong Kong and Macau belong to the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists imposed on China. Hong Kong and Macau are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and does not fall under the ordinary category of 'colonial Territories.' Consequently, they should not be included in the list of colonial Territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples. With regard to the questions of Hong Kong and Macau, the Chinese Government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions. For the above reasons, the Chinese delegation is opposed to including Hong Kong and Macau in the list of colonial Territories covered by the Declaration and requests that the erroneous wording that Hong Kong and Macau fell under the category of so-called 'colonial Territories' be immediately removed from the documents of the Special Committee and all other United Nations documents.

March 8, 1972 from the Permanent Representative of China to the United Nations addressed to the Chairman of the Special Committee, U.N. Doc. A/AC.109/396 (1972). Hong Kong and Macau were removed from the Committee's list.

The rationale seems to have been that if Hong Kong and Macau were left on the list of non-self-governing territories, the inference might be drawn that independence was a future option for them.

[84]. G.A. Res. 1514(XV), *supra* note 52, at para. 6.

The International Court of Justice confronted the "historical origins" argument in its Advisory Opinion on *Western Sahara.*[85] The case arose as a result of an attempt by Morocco and Mauritania to prevent independence for the Western Sahara. Instead, each government hoped to incorporate part of Western Sahara into its own territory.[86] In order to delay a referendum that had been recommended by the U.N., Morocco and Mauritania argued that, before colonial occupation, Western Sahara constituted an integral part of their territories and that such historical ties merited consideration in shaping decolonization.[87] United Nations' acquiescence in the "retrocession" to Morocco of the Spanish enclave of Ifni apparently stood as precedent for that claim. It seems that Ifni had been part of Morocco before being acquired by Spain. It was "restored" to Morocco following negotiations with Spain that were not seriously concerned with the democratically expressed will of the people of Ifni.[88]

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[85]. Advisory Opinion on Western Sahara, [1975] I.C.J. 12.

[86]. Franck & Hoffman, *supra* note 1, at 339.

[87]. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 65-66.
In the Western Sahara case, the Court was asked:

I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
If the answer to the first question is in the negative,

II. What were the legal ties between this Territory and the Kingdom of Morocco and the Mauritanian entity?

The first question was readily answered in the negative in view of the existence at the time of Spanish colonization of organized tribes in the area and the fact that Spain did not claim the territory by occupation. Rather Spain based its claim on treaties of protection with representatives of the inhabitants. When the Court turned its attention to the second question, Mauritania faced an additional hurdle in its effort to establish legal ties with the Western Sahara as it did not exist as a state in 1884, the time of the Spanish colonization of the Western Sahara.

[88]. *Id.* at 34. The General Assembly's consensus decision to take note of the settlement between Spain and Morocco of the Ifni matter hardly constitutes a strong endorsement of the propriety of the retrocession. It is, however, the only decision of the Assembly that the writer can find that comes close to an express endorsement of a settlement reached by the transfers of territory without some effort at consulting the population. The transfer of the French Establishments in India to India in the 1950s was never the subject of an Assembly resolution and was not discussed as a separate item. For the text of the transfer treaties, see Treaty of Cession of the Territory of the Free Town of Chandegore, Feb. 2, 1951, France-India, 203 U.N.T.S. 155; Treaty Ceding the French Establishments in India, May 28, 1956, France-India, 1962 Recueil des Traités et Accords (France) No. 33. India's invasion of Goa and the other Portuguese territories on the Indian continent in December, 1960, *supra* note 83, was considered by the Security Council, but the Council could not agree to adopt any resolutions and the matter simply lapsed. In August, 1961, Dahomey (as Benin was then known) seized the Portuguese enclave of Fort Sáo Joáo Baptista de Ajudá and ousted what seemed to have been a lone Portuguese official there. N.Y. Times, Aug. 2, 1961, at A13, col. 1. Portugal's objection to Dahomey's action was never the subject of a formal vote in the General Assembly supporting or criticizing it, but Dahomey appeared to have more support than Portugal in the discussion. *See* 16 U.N. GAOR, C.4 (1193d mtg.) 233-34, U.N. Doc. A/C.4/SR. 1193 (1961) (Dahomey claimed the enclave as "an integral part of Dahomey").

In its sometimes puzzling opinion, the I.C.J. took a nuanced position with regard to decolonization and the "free and genuine expression of the will of the peoples concerned."[89] While acknowledging the importance of the peoples' will in any exercise of self-determination, the Court noted that, in "certain cases," the General Assembly had dispensed with the need for consultations. In such situations the General Assembly had decided that either the concerned population did not "constitute a 'people' entitled to self-determination" or that, given the special circumstances involved, a consultation was not necessary.[90] The court then proceeded to establish that in the case of Western Sahara, the General Assembly had recognized the right of the indigenous population "to determine their future political status by their own freely expressed will" and that this right would not be affected by any decision the Court might make as to the existence of pre-colonial ties of territorial sovereignty between Western Sahara and Morocco or Mauritania.[91] The Court concluded that the existence of such precolonial ties might affect the General Assembly's decisions regarding modalities for the decolonization of Western Sahara in accordance with G.A. Res. 1514(XV).[92] But the Court indicated that the significance of such ties was exclusively dependent on the judgment of the General Assembly.[93] The Court then proceeded to examine the historical evidence and found that there were no ties of territorial sovereignty between Western Sahara and Morocco or "the Mauritanian entity" which "might affect the application of Resolution 1514(XV) in the decolonization" process.[94]

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[89]. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 32.

[90]. *Id.* at 33. The Court did not enumerate the "certain cases" it had in mind. In context, Ifni was plainly one.

[91]. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 36.

[92]. *Id.* at 36-37. "As to the future action of the General Assembly, various possibilities exist, for instance with regard to consultations between the interested States and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people." *Id.* at 37. The Court noted that the right of the Saharwi people to self-determination constituted "a basic assumption of the questions put to the Court." *Id.* at 36.

[93]. *Id.* at 37.

[94]. As the Court noted:

> [t]he materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Courts conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

Thus, where, as with the case of East Timor, the General Assembly has confirmed the population's right to a consultation,[95] the Court has indicated that historical claims should be treated with considerable skepticism and that the burden to show the contrary is upon proponents of such claims.[96] The Court concluded that evidence short of establishing ties of territorial sovereignty was insufficient to support historical claims.[97]

In view of the Court's rejection in the *Western Sahara* opinion of proof stronger than that available to establish pre-colonial Indonesian ties of territorial sovereignty to East Timor,[98] any Indonesian attempt to assert historical ties to East Timor should fail. Given the General Assembly's declaration that the East Timorese people are entitled to a consultation, no colorable claim exists that the decolonization of East Timor, like that of Ifni and other "certain cases," should be treated in a special manner.[99]

In firmly rejecting the notion that reintegration solely on the basis of historical claims is consistent with the principle of self-determination, the *Western Sahara* opinion added strength and universality of the principle of self-determination. Regrettably, the aftermath of the *Western Sahara* opinion arguably weakened-the principle. One day after the I.C.J. opinion was announced, King Hassan II of Morocco called for a peaceful invasion of Western Sahara to compel Spain to

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*Id.* at 68.

[95] Prior to the issuance of the Advisory Opinion, the General Assembly had confirmed the right of the Saharwi people to a referendum in nine resolutions: G.A. Res. 2072, 20 U.N. GAOR Supp. (No. 14) 59 U.N. Doc. A/6014; G.A. Res. 2229, 21 U.N. GAOR, Supp. (No. 16) 72, U.N. Doc. A/6316 (1966); G.A. Res. 2354, 22 U.N. GAOR. Supp. (No. 16) 53, U.N. Doc. A/6716 (1967); G.A. Res. 2428, 23 U.N. GAOR, Supp. (No. 18) 63, U.N. Doc. A/7218 (1968); G.A. Res. 2591, 24 U.N. GAOR, Supp. (No. 30) 73, U.N. Doc. A/7630 (1969); G.A. Res. 2711, 25 U.N. GAOR, Supp. (No. 28) 100, U.N. Doc. A/8028 (1970); G.A. Res. 2983, 27 U.N. GAOR, Supp. (No. 30) 84, U.N. Doc. A/8730 (1972); G.A. Res. 3162, 28 U.N. GAOR, Supp. (No. 30) 110, U.N. Doc. A/9030 (1973); G.A. Res. 3292, 29 U.N. GAOR, Supp. (No. 31) 103, U.N. Doc. A/9631 (1974).

[96] Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 41.

[97] *Id.* at 68.

[98] The claims of Morocco and Mauritania turned primarily on events which had occurred in the Nineteenth Century as to which there was at least some documentary evidence. The evidence for Timor's ties to Srivijaya as outlined by Indonesia in Nahar, *supra* note 51, depends upon the accounts of travellers. *Id.* at 1-2. The evidence in respect of Majapahit depends primarily upon the work of the poet Prapanca. *Id.* at 2-3. Reliance on the latter is similar to reliance on William Shakespeare for an accurate history of Denmark in the time of Hamlet.

[99] Moreover, even Indonesia consistently has recognized that the inhabitants of East Timor constitute a "people" for purposes of self-determination, as evidenced by its reliance on illusory acts of self-determination to defend its invasion and aftermath. *See* text accompanying notes 55-58 *supra*.

surrender the territory to the Moroccans.[100] When the Security Council failed to take decisive action, Spain entered into the "Madrid Agreement" ceding the territory to Morocco and Mauritania.[101]

In response to this flagrant violation of the principle of self-determination, the General Assembly reaffirmed the right of the Western Sahara population to self-determination, the General Assembly triewd to have it both ways. It noted the Madrid Agreement, and called on the Secretary-General to arrange for a supervised consultation to ascertain the wishes of the population.[102] The Moroccans staged an "act of free choice" in February, 1976 but the United Nations has never approved it.[103] As a result, the people of Western Sahara still possess their unexercised right to self-determination.

The failure of the United Nations to take unambiguous and effective action against Morocco struck a blow to the vitality of self-determination as a legal principle.[104] Both the Moroccan invasion and the Madrid Agreement flagrantly violated self-determination and, the General Assembly ought unequivocally to have denounced them. In the interest of preserving self-determination as more than an empty aspiration to those peoples to whom the right has attached, the General Assembly's subsequent "notice" of the agreement should be considered an aberration without precedential value. If the General Assembly's "notice" of the Madrid Agreement does carry some precedential weight, it lies in the General Assembly's simultaneous affirmation of the right of the people of the Western Sahara to be consulted on their future status. Consistently with this position, the General Assembly directed the interim government to permit a consultation. One should thus interpret Resolution 3458 (XXX) as recognizing the legitimacy of an interim regime in Western Sahara established and administered by Spain along with two neighboring states. It should, moreover, be read to require the termination of the regime upon the exercise of the peoples' right to self-determination. In view of the aftermath of the *Western Sahara* opinion, Indonesia's sole plausible claim to East Timor is as a participant in an interim regime jointly administered with Portugal and approved by the General Assembly. Given Portugal's failure to accept Indonesia's occupation of East Timor and the General Assembly's call for the withdrawal of Indonesian troops, the Moroccan occupation of Western Sahara is weak support for Indonesia's presence in East Timor.[105]

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[100]. Letter dated October 18, 1975, from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 17, U.N. Doc. S/11852 (1975).

[101]. The agreement resulted from secret negotiations between Morocco, Mauritania, and Spain, conducted in Madrid. The existence of the secret negotiations was disclosed in a joint communique issued on November 14, 1975. The agreement provided for the partitioning of Western Sahara between Morocco and Mauritania and permitted Spain to retain a 35 percent interest in a Saharan phosphate company valued at $700 million. The agreement also provided for establishing an interim regime that a Spanish governor would administer with the assistance of Moroccan and Mauritanian deputy governors. Franck & Hoffman, *supra* note 1, at 341.

[102]. G.A. Res. 3458A, 30 U.N. GAOR, Supp. (No. 34) 116-17, U.N. Doc. A/10034 (1975). The first part of the resolution reaffirmed of the right of the Saharwi people to self-determination in accordance with G.A. Res. 1514(XV), *supra* note 52, and took note "with appreciation" of the Court's Advisory Opinion. The second part mentioned both G.A. Res. 1514(XV), *supra* note 52, and G.A. Res. 1541(XV), *supra* note 5, in its preamble. (G.A. Res. 1541(XV), unlike G.A. Res. 1514(XV), refers to the possibility of integration with an independent state). It then proceeded to take note of the tripartite agreement and piously to "request the parties to the tripartite agreement to ensure respect for the freely expressed aspirations of the Saharan population." G.A. Res. 3458B, 30 U.N. GAOR, Supp. (No. 34) 117, U.N. doc. A/10034 (1975). For additional discussion of these resolutions, see Franck & Hoffman, *supra* note 1, at 340-42. For a time, it appeared that the basic principles of the Court's Opinion had been submerged in a expedient acquiescence by the United Nations in the Moroccan and Mauritanian actions. Because, however, the Frente POLISARIO had significant success in its military struggle against Morocco and Mauritania (which was forced to withdraw from the part of Western Sahara that it had claim), General Assembly resolutions ultimately demonstrated more support for the principles involved. *See*, in particular, G.A. Res. 46/67 (1991) (General Assembly reaffirmation of the right of the Saharwi people to "self-determination and independence" and welcoming decision by Security Council to establish a United Nations Mission for the Referendum in Western Sahara). At the time of writing, tortuous negotiations for the holding of the referendum continue.

[103]. U.N. Dept, of Political Affairs, Trusteeship and Decolonization, *The Question of Western Sahara at the United Nations*, DECOLONIZATION, Oct., 1980, at 51-52 [hereinafter cited as *The Question of Western Sahara*].

### 2. *Paragraph Six of G.A. Resolution 1514(XV)*

Reintegration of decolonized territories without prior consultation has also been justified as within the contemplation of paragraph six of General Assembly Resolution 1514(XV). Paragraph six provides:

> Any attempt aimed at the partial disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.[106]

The language of paragraph six is opaque and reflects the drafters' confusion about its intended effect.

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[104]. *Id.* at 53-60.

[105]. The case of East Timor can be distinguished further from the circumstances surrounding that of Western Sahara in a least two ways. First, in contrast to its failure to condemn unequivocally the Moroccan invasion, the General Assembly adopted a resolution within five days of the Indonesian bombardment of East Timor's major city, Dili, that strongly deplored "the military intervention of the armed forces of Indonesia in Portuguese Timor." G.A. Res. 3485, 30 U.N. GAOR, Supp. (No. 34) 18, U.N. Doc. A/10034 (1975). The resolution also called upon Indonesia to withdraw its forces without delay and affirmed the "inalienable right" of the East Timorese to self-determination. Secondly, unlike Spain, Portugal has not condoned acts of aggression against its former colony. *See* note 101 *supra*. On the contrary, the Security Council was convened to consider the situation in East Timor at Portugal's request, and the Portuguese consistently have condemned Indonesia's actions. *See, e.g.*, 30 U.N. SCOR, (1864th mtg.) 27, U.N. Doc. S/PV. 1864 (1975) (statement of Mr. Galvao Teles).

[106]. GA. Res. 1514(XV), *supra* note 52.

One reading arguably supports integration without consulting the indigenous population where the sovereign nation has a well-established historical claim to the territory. This interpretation relies on a few statements by delegates who participated in drafting paragraph six and denounced the disruption of territories caused by colonial occupation, thereby suggesting that paragraph six was intended to preserve the integrity of pre-colonial nations and empires.[107]

One proponent of this interpretation appears to have been Indonesia. At one point, Indonesia persuaded the Guatemalan representative to withdraw a proposed amendment to paragraph six.[108] The Guatemalan amendment stated that "[t]he principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory."[109] The Indonesian representative, however, argued that paragraph six as written already protected the claims of nations to their pre-colonial territory.

> When drafting this document my delegation was one of the sponsors of paragraph 6, and in bringing it into the draft resolution we had in mind that the continuation of Dutch colonialism in West Irian is a partial disruption of the national unity and the territorial integrity of our country.[110]

Unfortunately, perhaps, the Guatemalan amendment was withdrawn without a vote.[111] Its rejection or acceptance could have contributed significantly to determining whether the Indonesian interpretation of paragraph six was correct.

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[107]. *See* notes 110-15 *infra*.

[108]. 15 U.N. GAOR, (947th plen. mtg.) 1271, U.N. Doc. A/PV. 947 (1960).

[109]. 15 U.N. GAOR, Annexes (Agenda Item No. 87) 7, U.N. Doc. A/L. 325 (1960). Guatemala may have been jockeying for position in its dispute with Great Britain over British Honduras (Belize).

[110]. 15 U.N. GAOR, (947th plen. mtg.) 1271, U.N. Doc. A/PV. 947 (1960). In view of its usual argument for sovereignty over West Irian, based on the theory that it succeeded to all the territory of the former Dutch East Indies, *see* note 18 *supra*, Indonesia, paradoxically, did not need to espouse the broader Guatemalan position. The narrower interpretation of paragraph six, *see* notes 119-20 *infra*, was sufficient to make its case. (The Dutch of course disputed the point on the merits and argued that West Irian had been administered separately from the remainder of the Dutch East Indies and that its peoples were ethnically distinct.)

[111]. 15 U.N. GAOR, (947th plen. mtg.) 1271, U.N. Doc A/PV. 947 (1960)

Other delegates made statements that seemed to support the Indonesian interpretation. Jordan, for example, argued that "[t]he usurpation of a part of the Arab territory of Palestine by the joint aggression of colonialism and zionism" was a prime example of a situation within the reach of paragraph six.[112] The Moroccan representative explained that his country supported paragraph six on the assumption that it covered, *inter alia*, "the regrettable dismemberment and occupation of Palestine . . . by this new phenomenon of foreign colonialism known as international Zionism," and the "silent tactics of the viper—of French colonialism to partition Morocco and disrupt its national territorial unity, by setting up an artificial state in the area of Southern Morocco which the colonialists call Mauritania."[113] This interpretation has been infrequently though forcefully invoked to justify an historical claim to a neighboring territory.[114] In at least two instances the General Assembly has countenanced such claims.[115]

A right to reintegrate pre-colonial territory, however, is not the most favored construction of paragraph six. Rather, states have more often invoked paragraph six in order to deny one faction of the population of a non-self-governing territory or of an independent country the right to secession.[116] It is this use of paragraph six

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[112]. 15 U.N. GAOR, 946th plen. mtg.) 1265, 1268, U.N. Doc. A/PV. 946 (1960).

[113]. 15 U.N. GAOR, (947th plen. mtg.) 1271, 1284, U.N. Doc. A/PV. 947 (1960).

[114]. *See* notes 84 & 111 *supra*.

[115]. *See* Franck & Hoffman, *supra* note 1, at 371-79 (Gibraltar) and 379-84 (Falkland Islands).

[116]. As the Trust Territory of New Guinea approached independence in union with the Australian territory of Papua, centrifugal forces began to manifest themselves. This was particularly the case in the island of Bougainville, which is some distance from the New Guinea mainland and is geographically part of the Solomon Islands. The General Assembly "*[s]trongly endorse[d]* the policies of the administering Power and the Government of Papua New Guinea aimed at discouraging separatist movements and at promoting national unity." G.A. Res. 3109, 28 U.N. GAOR, Supp. (No. 30) 91-92, U.N. Doc. A/9030 (1973). From 1979, the General Assembly has been considering the claim of Madagascar to the islands of Glorieuses, Juan de Nova, Europa and Bassas de India, which were governed by the French as part of the Madagascar colonial territory but did not become a part of Madagascar when it became independent in 1960. The Representative of Algeria made the point clearly in the Special Political Committee.

> Thus even if the islands had not belonged to Madagascar before the French colonization, they would have so belonged by virtue of their attachment to Madagascar under the French Occupation. Under the law of succession of states, when a colonial Power withdrew from its possessions it handed over the territories in question within the same boundaries which they had during the colonial period. Whenever a colonial Power had tried to hand over only part of a territory, disputes had arisen which had been resolved only by ensuring that the entire territory was handed over. Failure to do so violated the principle that the frontiers of the new State could be defined by reference to its frontiers under colonial domination.

34 U.N. GAOR, Special Political Committee (38th mtg.) 5-6, U.N. Doc. A/SPC/34/SR. 38 (1979).
The General Assembly has referred specifically to the preservation of national unity and territorial integrity in

that most states contemplated when they approved the Resolution.

> [M]ost states voting for Resolution 1514's paragraph 6 probably did so in the belief that they were creating a sort of grandfather clause: setting out the right of self-determination for all colonies but not extending it to parts of decolonized states and seeking to ensure that the act of self-determination occurs within the established boundaries of colonies, rather than within sub-regions. The U.N. debates and their juxtaposition with events in the former Belgian Congo make clear that the desire to prevent self-determination from becoming a justification for Katanga-type secessions was uppermost in the minds of most delegates.[117]

More specifically, the underlying purpose was to prevent a part of the non-self-governing territory, in particular the wealthiest part, from negotiating a separate agreement with the former colonial power. There were also fears that the wealthier part might become, apart from the remainder of the territory, an associate state of that power. The delegate of Cyprus expressed these concerns during the deliberations over paragraph six, calling it "essential in order to counter the consequences of the policy of 'divide and rule', which often is the sad legacy of colonialism and carries its evil effects further into the future."[118] Consistent with these statements of purpose is the fact that in subsequent usage within the United Nations, paragraph six has been invoked primarily to support denying a right of secession to parts of a territory at or subsequent to independence.[119] Thus, any attempt on the part of the Indonesians to invoke paragraph six in their defense is to resort to a less accepted and little used construction of that provision.

Assuming that paragraph six supports reintegration without prior consultation with the indigenous population, Indonesia still has no grounds for invoking it in its defense. First, as discussed in connection with the *Western Sahara* opinion, Indonesia's historical claim to East Timor is spurious at best.[120] There is no convincing proof that East Timor ever formed an integral part of a pre-colonial

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supporting the Madagascar claim. G.A. Res. 34/91, 34 U.N. GAOR, Supp. (No. 46) 82, U.N. Doc. A/34/46 (1979). The Assembly has similarly invoked the language of paragraph six of G.A. Res. 1514(XV), *supra* note 52, in support of the claim of the Comoro Republic to the island of Mayotte over which the French retained control at the time of Comorian independence. G.A. Res. 35/43, 35 U.N. GAOR, Supp. (No. 48) 18, U.N. Doc. A/35/48 (1980). The Madagascar and Comoro instances appear to be exactly the type of case that the spokesman for Cyprus had in mind, *see* text accompanying note 118 *infra*.

[117]. Franck & Hoffman, *supra* note 1, at 370. This approach to para. 6 is consistent with the principle of *uti possidetis*, or respect for the boundaries at the time of decolonization recognized by the Chamber of the International Court in Case Concerning the Frontier Dispute (Burkina Faso v. Mali) [1986] I.C.J. 554, 566-67.

[118]. 15 U.N. GAOR, (945th plen. mtg.) 1247, 1255, U.N. Doc. A/PV. 945 (1960).

[119]. *See* note 116 *supra*.

[120]. *See* particularly notes 80 and 98 *supra*.

Indonesian empire. Indeed, the ethnic and cultural roots of the East Timorese and the Indonesians suggest the contrary.[121] Secondly, also noted above, any attempt by Indonesia to defend its invasion on such grounds conflicts with its own declaration that it had no intent to claim East Timor as an integral part of its colonial or pre-colonial legacy.[122]

Any such claims that Indonesia has right to "reintegrate" East Timor because of historic, ethnic, and cultural ties, have no factual or legal basis. Factually, it is unlikely that such ties exist. If they did, they would not render legal the action in which Indonesia engaged. Neither the *Western Sahara* opinion and its aftermath nor paragraph six of Resolution 1514 credibly support Indonesia's claims.

### 3. East Timorese "Economic Nonviability"

In statements by Foreign Minister Adam Malik in December, 1974, the Indonesian government alluded to a possible third defense of its invasion and occupation of East Timor. Malik contended that independence was "not [a] realistic" hope for East Timor in view of "the backwardness and economic weakness of the population."[123] As a result, only two alternatives were available to the East Timorese: (1) continued Portuguese rule, or (2) integration with Indonesia.

Resolution 1514(XV) rebuts any suggestion that a lack of economic viability is grounds for delaying independence to a non-self-governing territory. Paragraph two refers to self-determination as a right of "[a]ll peoples."[124] Paragraph three specifically provides that "[i]nadequacy of political, economic, social and educational preparedness should never serve as a pretext for delaying independence."[125]

Aside from its legal defects, the argument that East Timor's economic deficiencies provide a basis for denying it independence has little basis in fact. Admittedly, under Portuguese administration, the East Timorese economy was stagnant and primarily agrarian[126] and Portuguese contributions were needed to make up trade deficits.[127] It should be noted, however, that a 1975 United Nations report describes the area as having fertile lands, valuable forests, and probably "deposits of copper, gold, manganese and petroleum."[128] Clearly, there has been little, if any, capital development—but widespread starvation became a problem only after the Indonesian invasion.[129] There is every reason to believe that East Timor possesses the natural resources with which to build a viable economy. East Timor's economic potential is underscored by the intense interest in the area shown by Portuguese, Australian and American oil interests.[130] Thus, neither on the facts nor the law, was East Timor's economic condition a serious impediment to its independence.[131]

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[121]. *See* note 81 *supra*.

[122]. *See* note 82 *supra*.

[123]. *Issue on East Timor*, *supra* note 4, at 14.

[124]. G.A. Res 1514(XV), *supra* note 52, at para. 2

[125]. *Id.* at para 3.

[126]. Report of the Special Committee on the situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 24 U.N. GAOR, 2 Supp. (No. 23) 259-61, U.N. Doc. A/7623/Rev. 1 (1969).

## III. Armed Aggression against East Timor

Besides denying self-determination to East Timor by "reintegrating" it, Indonesia also violated international law by its invasion of East Timor. As provided in Article 1 of the Charter, one of the purposes of the United Nations is "[t]o maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of acts of aggression or other breaches of the peace."[132] Article 2 of the Charter establishes 'Principles' defining

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[127]. *Id.* at 261.

[128]. Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 30 U.N. GAOR, 2 Supp. (No. 23) 38, U.N. doc. A/10023/Rev. 1 (1975).

[129]. Kamm, *supra* note 1, at 58.

[130]. J. JOLLIFFE, *supra* note 1, at 99-100, 295. In light of the economic inadequacy argument, there is, of course, the irony of the Australian-Indonesian division of the Timorese Continental Shelf resources. *See*, Clark, *Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia,"* [1992] PACE Y.B. INT'L L. 1.

[131]. Should it be suggested that East Timor has inadequate human resources to qualify for independence, it should be noted that in 1975, the population of East Timor was estimated at between 650,000 and 670,000. Report of the Secretary-General, *supra* note 35, at para. 7. On that basis, the population of East Timor was larger than that of a least nineteen U.N. members at that date. *See* [1975] U.N. Demographic Y.B. 160-64 (Many considerably smaller states have since joined, including San Marino with its population of 22,000.) East Timor could hardly be regarded as a mini-state. Nevertheless, it should be noted that any discussion in the United Nations about the danger of a world including numerous mini-states had ended long before 1975. *See* Gunter, *What happened to the United Nations Ministate problem?*, 71 AM. J. INT'L L. 110 (1977).

[132]. U.N. CHARTER art. 1, para. 1. The authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" is lodged in the Security Council. U.N. CHARTER art. 39. The General Assembly devoted years of prodigious energy to the attempt to define aggression. Its final product, the "Definition of Aggression," contained in G.A. Res. 3314, 29 U.N. GAOR, 1 Supp. (No. 31) 142, U.N. Doc. A/9631 (1974),

Members' responsibility that are intended to implement the purposes of the Charter.[133] Article 2(4) provides:

> All Members shall refrain in their international relations from the threat or *use of force against the territorial integrity or political independence of any state*, or in any other manner inconsistent with

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contains numerous ambiguities and circularities—but the core of the Definition clearly applies to Indonesia's actions:

> *Article 1*
>
> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.
>
> *Explanatory note:* In this Definition the term "State":
>
> (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
>
> (b) Includes the concept of a "group of States" where appropriate.
>
> *Article 2*
>
> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> *Article 3*
>
> Any of the following acts, regardless of a declaration of war, shall subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof. . . .

*Id.* at 142-43.

For a discussion of the defining process, see B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION (1975); J. STONE, CONFLICT THROUGH CONSENSUS (1977). The Definition, which was adopted by consensus in the General Assembly, is arguably either an authoritative interpretation of the Charter or a codification of customary law. At the very least, Indonesia appears to have contravened art. 2 and art. 3, para. (a) of the Definition. Professor Stone discusses the application of the Definition of Aggression to East Timor in light of the *Explanatory note* to Article 1 of the Definition. The whole of his unilluminating discussion is:

> As already noticed, the oracular caveat in Explanatory Note (a) to Article 1 of the Consensus Definition that its use of the term "State" is "without prejudice to questions of recognition" or of Membership of the United Nations, brought little light to such matters. The Indonesian military activity in East Timor early in 1976, which culminated in its virtual annexation, was not in *direct* conflict with other pre-existing State. It is difficult to see how Explanatory Note (a) helps *the application of this Definition* as between Indonesia and the Fretilin forces struggling for independence. This is because it remains most obscure and debatable, even with Explanatory Note (a), whether and in what sense that Definition is limited to State-to-State aggression. And, of course, it was arguable that (as with Angola) East Timor still lacked at the time of the military intervention concerned the stable government necessary for statehood.

*Id.* at 131 (emphasis in original). *See also* notes 138 and 141 *infra*.

[133]. U.N. CHARTER art. 2.

the Purposes of the United Nations.[134]

No one disputes that Indonesia used force against East Timor.[135] Moreover, it is clear that Indonesia's use of force was against another territorial entity,[136] and therefore not a matter within Indonesia's domestic jurisdiction.[137]

Nevertheless, it might be argued that East Timor was not a "state" at the time of the Indonesian invasion and hence the provision of Article 2(4) protecting the "territorial integrity" and "political independence" of a "state" is not applicable.[138] Such a narrow construction of the term "state,"[139] however, unduly restricts the effectiveness of 2(4). Regardless of what "state" might mean elsewhere in the Charter,[140] for the purposes of Article 2(4), it should be

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[134]. U.N. CHARTER art. 2, para. 4 (emphasis added).

[135]. Portugal notified the Security Council of the Indonesian invasion on December 7, 1975. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 66, U.N. Doc. S/11899 (1975). On December 25, the international press reported a second Indonesian attack on East Timor. This report was confirmed by Portugal. *Issue on East Timor, supra* note 4, at 31. The General Assembly and the Security Council recognized and deplored Indonesia's primary role in the invasion. G.A. Res. 3485, 30 U.N. GAOR, Supp. (No. 34) 118, U.N. Doc. A/10034 (1975); S.C. Res. 384 (1975), *supra* note 33. *See generally* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14), 11 U.N. Doc A/6104 (1965); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970); 30 U.N. SCOR (1864th mtg.) 21, 28, U.N. Doc S/PV. 1864 (1975) (remarks of Portuguese representative); 31 U.N. SCOR (1914th mtg.) 26, U.N. Doc. S/PV. 1914 (1976) (remarks of Benin representative); 30 U.N. SCOR (1865th mtg.) 6, U.N Doc. S/PV. 1865 (1975) (remarks of Chinese representative). The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, *supra*, was invoked against Indonesia by the Representative of Guyana, 30 U.N. SCOR (1869th mtg.) 13, U.N. Doc. S/PV. 1869 (1975); 31 U.N. SCOR 1913th mtg) 3, U.N. Doc. S/PV. 1913 (1976). The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *supra* was applied to Indonesia by the Representative of Rumania, 31 U.N. SCOR (1914th mtg.) 31 U.N. SCOR (1914th mtg.) 31, U.N. Doc. S/PV. 1914 (1976).

[136]. First, Indonesia had not yet itself declared the "reintegration" of East Timor into the Indonesian Republic when it launched its armed attacks. *See* text accompanying notes 31-44 *supra*. Second, the very defenses raised by Indonesia to justify its use of force presuppose that the invaded territory is not within the sovereign power of the aggressor. *See* text accompanying notes 144-83 *infra*.

[137]. The United Nations Charter provides that:

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7. furthermore, some jurists maintain that decolonization issues are of international cognizance in the first instance and therefore not within the domestic jurisdiction of any state. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 103 (1963).

[138]. This (weak) argument was espoused by the Representative of New Zealand in explanation of his abstaining vote on the General Assembly resolution adopted immediately after the Indonesian invasion. 30 U.N. GAOR, C.4 (2189th mtg.) 413, U.N. Doc. A/C.4/SR. 2198 (1975). *And see* STONE, *supra* note 132. The Netherlands had made a similar argument in respect of Indonesia in the 1940s. It was probably a stronger argument as between the

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Netherlands and its erstwhile colony, to which a case based on noninterference in internal affairs might be made, than it was as between Indonesia and a colony under the administration of another state. Nevertheless, the Netherlands' argument was side-stepped by the United Nations. *See* A. TAYLOR, INDONESIAN INDEPENDENCE AND THE UNITED NATIONS 355-56, 371-73 (1960). In spite of the relatively few grants of recognition that East Timor had received on the eve of the Indonesian invasion, a persuasive case can be made that it was in fact a state, with FRETILIN its government. The better view of recognition is that it is merely declaratory and its absence does not preclude the existence of a state or government as the case may be, if the relevant objective characteristics are met. *See* BROWNLIE, *supra* note 82, at 88-91. The characteristics of statehood are usually said to be (a) a permanent population, (b) a defined territory, (c) a government, and (d) capacity to enter into relations with other states. *Id.* at 74. East Timor on December 7, 1975, with FRETILIN in effective control (control generally being the test for a government) apparently met those criteria. It should also be noted that in current state practice, formal recognition or non-recognition is less important than might once have been the case. *See generally* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 87 (1987).

Events subsequent to the Indonesian invasion, however, tend to suggest that the Democratic Republic of East Timor never achieved the status of a state. FRETILIN representatives, supported in their efforts by a letter from the Representative of Guinea-Bissau to the President of the Security Council, *reprinted in* 30 U.N. SCOR, Supp. (Oct.- Dec. 1975) 66, U.N. Doc. S/11911 (1975), arrived in New York on December 11, 1975 to supply the Security Council with information regarding the invasion. The Representative of Guinea-Bissau invoked Rule 39 of the Provisional Rules of Procedure of the Security Council as the basis of its request. This Rule states: "The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence." Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.6 (1974). The fact that Guinea-Bissau found it necessary to invoke Rule 39 underscored the tenuous diplomatic position of the Democratic Republic of East Timor. From the point of view of FRETILIN and those states that had recognized it as a government, *see* note 29 *supra*, the Democratic Republic of East Timor should have been permitted to participate pursuant to the U.N. Charter, which provides, in relevant part, that:

> [a]ny Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

U.N. CHARTER art. 32. In other colonial situations prior to the East Timor imbroglio, nascent states had successfully invoked Article 32. Indonesia, in its dispute with the Netherlands, had enough diplomatic clout to have itself treated as a non-Member state within the meaning of Article 32. *See* A. TAYLOR, *supra*, at 368. (Note the success of the Palestine Liberation Organization in having itself treated by the Security Council as if it were a *member* state. *See* F. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 11218 (1977).) In short, the Guinea-Bissau letter probably reflected the reality that, since Portugal had not recognized the Democratic Republic of East Timor, and the United States, Britain and France (and perhaps the U.S.S.R.) were not eager to offend Indonesia more than was absolutely necessary, the votes were simply not there to treat FRETILIN as the government of the state.

[139]. *And see supra* note 132.

[140]. *See* note 141 *infra*.

interpreted in order to serve the broad objectives of the Charter[141] and, in particular, the first purpose listed in Article 1: "to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace."[142] The very fact that the term "state" was chosen rather than the more narrow terms "member" or "nation" itself suggests that a broader and more comprehensive interpretation was intended. To this end, the term "state," as used in Article 2(4), should be considered to include all territorial entities, including East Timor.

Even if East Timor were not a state, Indonesia's invasion violated Articles 1 and 2 of the Charter. Article 1, paragraph 1 prohibits all "*acts of aggression* or other *breaches of the peace,*" and Article 2, paragraph 4 prohibits "the threat or use of force . . . in *any* . . . manner inconsistent with the Purposes of the United Nations." Those Purposes include "develop[ing] friendly relations among nations based on *respect for the principle of equal rights and self-determination of peoples*. . . ."[143] Neither of these provisions is restricted in its applicability to states. Thus, the Indonesian invasion—an act of aggression, a breach of the peace, and a violation of the principle of self-determination—violated the U.N. Charter.

Indonesia has attempted to justify its use of force against East Timor on four grounds: (1) self-defense, (2) invitation by the East Timorese, (3) future stability of Indonesia and Southeast Asia, and (4) humanitarian purposes. Although international law recognizes the legitimacy of armed intervention into another territory under certain circumstances,[144] Indonesia has not shown that its invasion falls within any of the recognized exceptions.

### A. *"Self-Defense"*

Indonesia has attempted to justify its invasion of East Timor as an exercise of its inherent right to self-defense: "incursions by armed bands into Indonesian territory had made it necessary for Indonesia to take appropriate action to prevent territorial violations and the harassment of its people."[145] The use of force in self-defense is recognized by Article 51 of the U.N. Charter as a justifiable interim response to armed attack until such time as the Security Council undertakes action "to maintain international peace and security."[146] The U.N. Charter doctrine of self-defense contemplates that the use of such force will be proportional to the precipitating attacks,[147] and requires the defending state to notify the Security Council of its actions.[148]

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[141] The term "state" has been broadly interpreted elsewhere in the Charter. For the purposes of defining membership pursuant to U.N. Charter Article 3, the term "state" was considered sufficiently broad to include the Ukrainian S.S.R. and the Byelorussian S.S.R. as well as the Philippines and India, the latter two being colonies at the time their membership in the U.N. was recognized. In its dispute with the Netherlands, Indonesia was treated as a "state which is not a member of the United Nations" for purposes of Charter Article 32. *See* note 138 *supra*. It strains credulity to think that the drafters of the Charter could have meant that non-self-governing territories were fair game to predators because they were not technically "States."

[142] U.N. CHARTER art. 1, para. 1.

[143] U.N. CHARTER art. 1, para. 2. (Author's emphasis).

[144] *See* text accompanying notes 145-83 *infra*.

[145] U.N. GAOR, C.4 (2180th mtg.) 356, 358, U.N. Doc. A/C.4/30/SR. 2180 (1975). A similar statement was made in the Security Council, 30 U.N. SCOR (1864th mtg.) 37, U.N. Doc. S/PV. 1864 (1975).

In view of the lack of evidence that East Timorese troops ever launched unprovoked attacks into Indonesian territory,[149] Indonesia's invocation of self-defense is suspect. Any fighting involving Indonesia probably resulted from Indonesian aid—including troops and air and naval craft—to UDT and APODETI forces using Indonesian Timor as a sanctuary from which to attack East Timor.[150] Moreover, even if East Timor did launch unprovoked border incursions into Indonesia, Indonesia's armed attack was grossly disproportionate to whatever border incursions East Timor might have initiated[151] and Jakarta did not notify the Security Council of its actions.[152]

### B. *"Invitation" of the East Timorese*

Indonesia has also argued that its troops were sent to East Timor in response to a request "issued on 30 November 1975 by the four political parties . . . representing the large majority of the population of Portuguese Timor."[153] That is, Indonesia has claimed that its presence in East Timor was requested by the people, and intended solely to assist them in establishing conditions for the peaceful and orderly exercise of their right to self-determination.

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[146] U.N. CHARTER art. 51.

[147] I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261-64 (1963).

[148] U.N. CHARTER art. 51.

[149] Indonesia claimed that FRETILIN shelled towns within Indonesian Timor. *Issue on East Timor, supra* note 4, at 27.

[150] This allegation by Fretilin was later confirmed by Australian observers who visited East Timor during the few months prior to the Indonesian invasion and appears to have been accepted as accurate by the foreign news media. *Issue on East Timor, supra* note 4, at 26-27.

[151] Logic would seem to indicate that a proportional response to border incursions would involve nothing more than action taken to secure the border. Such action certainly would not include a full-scale invasion and annexation.

[152] Indonesia's only act of "notification" to the Security Council came in response to the resolutions adopted by the General Assembly and the Security Council. *Issue on East Timor, supra* note 4, at 59.

[153] 30 U.N. GAOR, C.4 (2187th Mtg.) 403, 404, U.N. Doc. A/C.4/30/SR. 2187 (1975) (statement by representative of Indonesia).

International law traditionally has recognized the privilege of states to give military assistance, when requested, to governments of other states that are engaged themselves in acts of self-defense.[154] Because such action is characterized as a component of the self-defense doctrine,[155] it is considered to fall within the express recognition of Article 51 of the Charter. The right to assist other states is not, however, unlimited. In order that the assistance not violate a second state's "territorial integrity or political independence,"[156] the intervening states must be invited by *the recognized government* of the second state.[157]

Here, the "invitation" was defective because it did not emanate from a recognized state government.[158] In the same debate in which the Indonesian representative to the Fourth Committee characterized the joint resolution of the four political parties as an invitation, he acknowledged both that no faction could authoritatively claim to represent the people of East Timor,[159] and that Portugal remained the responsible, albeit criminally negligent, administering power.[160] Given Indonesia's failure to recognize the four parties or any one of them as the legitimate government of East Timor,[161] and the undisputed fact that Indonesian intervention was not requested by Portugal,[162] an attempt by Indonesia to legitimate its forceful intervention as a response to a request must fail.[163]

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[154]. *See* D. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 200, 205-15 (1958) (collective right of self-defense has long been accepted); I. BROWNLIE, *supra* note 147, at 321-22, 327, 328-33 (right to assist states has remained part of state practice under U.N. Charter); Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66, 67-68 (1937) (it is legal to aid "legitimate governments" but illegal to aid insurgents until they become recognized belligerents); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 245 (1969) ("The traditional rule is said to be that it is lawful to assist a widely recognized government at its request at least until belligerency is attained.") *But see* Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 532 (1969) (traditional rule has been eroded to the point where it has lost its normative capacity and should be replaced by "a rule that would legitimate assistance short of tactical military support, either to incumbents or rebels, but would proscribe absolutely the commitment of combat troops or battlefield advisers (or 'volunteers') no matter how few or how negligible their effect"). This rule clearly would proscribe the Indonesian action.

[155]. States that intervene on behalf of, and at the request of a second state are said to be engaging in an exercise of the inherent right of collective self-defense, a right expressly recognized in the U.N. Charger. U.N. CHARTER art. 51. *See* I. BROWNLIE, *supra* note 147, at 329 ("The express recognition of a right of collective self-defence in Article 51 of the United Nations Charter gave the right a precise legal status which it perhaps lacked previously.") (Footnote omitted).

[156]. U.N. CHARTER art. 3, para. 4.

[157]. *See* Garner, *supra* note 154, at 67-68; I. BROWNLIE, *supra* note 147, at 327 ("Aid may be given to the government on the basis of the right assumed to exist in customary law of aiding a legitimate government.") (Footnote omitted).

[158]. The "invitation" emanated from four political parties that, it was claimed, represented the large majority of the population of East Timor, 30 U.N. GAOR, C.4 (2187th mtg.) 403, 404, U.N. Doc. A/C.4/30/SR. 2187 (1975). These organizations could hardly be considered a recognized state government in view of the fact their invitation was issued two days after the unilateral declaration of independence by FRETILIN, *Issue on East Timor*, *supra* note 4, at 28, who at the time administered East Timor and enjoyed the overwhelming support of the population. *Id.* at 23.

[159]. 30 U.N. GAOR, C.4 (2187th mtg.) 403, U.N. Doc. A/C.4/30/SR. 2187 (1975).

### C. *Long-Term Regional "Security"*

Indonesia has also attempted to defend its actions on the grounds that they were necessary to maintain the long-term stability of Indonesia and Southeast Asia.[164] The fear that the East Timor conflict would pose a threat to regional stability was apparently rooted in the proposition that FRETILIN was a Communist-controlled organization.[165] There is, however, evidence to the contrary.[166] Nevertheless, even if the proposition were true, the doctrine of self-defense does not recognize a state's right to launch an armed attack as a "prophylactic" measure to thwart future threats posed by a neighboring state or territory. And even if a preemptive strike is sometimes lawful, a debatable proposition, the threatened danger must be imminent.[167] FRETILIN posed no such threat.[168] Finally, even if international law did allow such attacks in certain situations, the Indonesian invasion was still illegal because it was wholly disproportionate to whatever "threat" existed.[169]

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[160]. *Id.*

[161]. No evidence of Indonesia having granted recognition to these four parties, or any one of them, as the legitimate government of East Timor appears in the public record.

[162]. Portugal termed Indonesia's intervention "an act of aggression," severed diplomatic relations with Indonesia, and called for an urgent meeting of the Security Council, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 53, U.N. Doc. S/11899 (1975), hardly the response of a state that had requested Indonesia's intervention.

[163]. Because the Indonesian argument fails to make out a colorable claim for the legitimate governing status of the four parties who issued the joint declaration of November 30, 1975, other rules associated with the law of collective self-defense need not be considered. *See generally* I. BROWNLIE, *supra* note 147, at 261-65, 269-75, 328-31; R. HIGGINS, *supra* note 137, at 197-210; D. BOWETT, *supra* note 154, at 184-99.

[164]. DOCUMENTS, *supra* note 22, at 203-07

[165]. *See Issue on East Timor, supra* note 4, at 15-16, 25; DOCUMENTS, *supra* note 22, at 204.

[166]. *Issue on East Timor, supra* note 4, at 10.

[167]. The so-called right of anticipatory self-defense is generally assumed to be permitted by customary law in the face of imminent danger. I. BROWNLIE, *supra* note 147, at 257. Yet as a matter of principle and policy, anticipatory self-defense is open to certain objections. It involves a determination of the certainty of attack, which is extremely difficult to make, and necessitates an attempt to ascertain the intention of a government. This process may lead to a serious conflict if there is a mistaken assessment of a situation. *Id.* at 259. In the modern era, the right of anticipatory self-defense has been under general attack, leading one jurist to conclude that U.N. Charter Article 51 does not permit anticipatory action. *Id.* at 278. Another jurist notes that the United Nations' refusal to give rein to the doctrine should be viewed merely as reluctance on its part to encourage use of the right rather than a restriction of the right as laid down in *The Caroline*. J. MOORE, DIG. OF INT'L L. 409 (1906); R. HIGGINS, *supra*

### D. *"Humanitarian" Intervention*

The final defense suggested by Indonesian statements is that the invasion was undertaken to rectify inhuman conditions in East Timor.[170] Five standards have been used to evaluate the legitimacy or a putative humanitarian intervention:[171]

> (1) an immediate and extensive threat to fundamental human rights particularly a threat of widespread loss of human life; (2) a proportional use of force which does not threaten greater destruction of values than the human rights at stake; (3) a minimal effect on

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note 137, at 203.

[168]. *See* text accompanying notes 149-50 *supra*.

[169]. The border clashes in East Timor began shortly after the end of the civil war in the colony in mid-September, 1975. Full-scale fighting took place in the border town of Batugade in mid-October. *Issue on East Timor, supra* note 4, at 26. It was also reported that in early October, Indonesia had seized three towns across the border. Kamm, *supra* note 1, at 58. Indonesia accused the FRETILIN forces of frequent border violations and the bombardment of towns inside Indonesian Timor. *Issue on East Timor, supra* note 4, at 27. The border clashes between FRETILIN forces and Indonesia lasted for just over two months before the Indonesian invasion. No evidence appears in the record to indicate that FRETILIN attempted to occupy any part, substantial or otherwise, of Indonesian Timor. Nor has Indonesia attempted to assert such a claim. In the absence of evidence to indicate a full-scale invasion contemplated by or attempted by FRETILIN, Indonesia's intervention on December 7, 1975, was certainly disproportionate to the threat presented by the border clashes. *See* notes 150-51 *supra*.

[170]. In the General Assembly, Indonesia argued that "[a]s a result of the fighting in Portuguese Timor, Indonesia was confronted with serious difficulties. First, the thousands of refugees had to be fed and cared for, they were prepared to return to their villages if Indonesia could guarantee their safety." 30 U.N. GAOR, C.4 (2180th mtg.) 356, 357, U.N. Doc. A/C.4/30SR. 2180 (1975). This argument was made on December 3, 1975, four days before the invasion. It was repeated almost verbatim in the Security Council two weeks later. *See* 30 U.N. SCOR (1864th mtg.) 37, U.N. Doc. S/PV. 1864 (1975).

[171]. "Humanitarian intervention" is the threat or use of armed force by a state, group of states, a belligerent community, or an international organization, with the object of protecting human rights. *See* Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217 (J. Moore ed. 1974). Humanitarian intervention as a justification for intervention has been the subject of much study and scholarly writing. *See, e.g.*, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Frank & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L l. 275 (1973); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 205 (1969). The current debate centers on the doctrine's existence as much as its contemporary relevance. Historically, there have been several cases where intervention allegedly occurred for humanitarian purposes. *See* M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 22-24, 26-37, 39-41. *But see* Franck and & Rodley, *supra* ("examples" of humanitarian intervention do not support this doctrine).

> authority structures; (4) a prompt disengagement, consistent with the purpose of the action; and (5) immediate full reporting to the Security Council and appropriate regional organizations.[172]

Some jurists have suggested additional standards, including the relative disinterestedness of the state invoking the coercive measures.[173]

There is little if any dispute that the people of East Timor had been, prior to the Indonesian invasion, living in conditions of abject poverty.[174] There is no evidence, however, to suggest that those conditions rose to the level of human rights violations. Inhuman conditions that would have constituted human rights violations arose primarily as a result of the Indonesian invasion.[175] Yet, even assuming the prior existence of human rights violations in East Timor, Indonesia's intervention failed to meet any of the other conditions. There is no evidence to indicate that Indonesia solicited the support of the U.N. or other multinational organizations.[176] Its use of force was not proportional to humanitarian objectives.[177] Indeed, rather than correcting inhuman conditions in East Timor, it probably created those conditions; certainly it aggravated and prolonged them![178] Nor was the use of force terminated as soon as the objectives of the intervention had been achieved.[179]

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[172]. Moore, *The Control of Foreign Intervention in Internal Conflict* 9, VA. J. INT'L L. 205, 264 (1969).

[173]. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 248 (J. Moore ed. 1974). *See also* Reisman, *Humanitarian Intervention to Protect the Ibos* in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 193 (R. Lillich ed. 1973); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 347-51 (1967); Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order*, 43 DENVER L. J. 439, 475 (1966).

[174]. N.Y. Times, Aug. 12, 1975, at A2, col. 3.

[175]. *See* note 1 *supra*.

[176]. Indonesia's only contact with the U.N. came after the invasion, when in the Fourth Committee, the General Assembly and the Security Council, it attempted to justify its intervention on the grounds stated throughout this Article. *See* 30 U.N. GAOR, C.4 (2185th mtg.) 397, 400, U.N. Doc. A/C.4/SR. 2185(1975); 30 U.N. GAOR (2439th plen. mtg.) 42, U.N. Doc. A/PV. 2439 (1975); 30 U.N. SCOR (1864th mtg.) 31, U.N. Doc. S/PV. 1864 (1975).

[177]. On December 7, 1975, the day of the Indonesian invasion, there did not exist in East Timor conditions which would have warranted a use of force for humanitarian reasons. FRETILIN was in control of East Timor. There were no reports of violations of human rights perpetrated by the FRETILIN administration. *See Issue on East Timor, supra* note 4, at 23. A proportional response to the problem of starvation in East Timor certainly would not include a full-scale invasion and occupation.

[178]. *See* note 1 *supra; Issue on East Timor, supra* note 4, at 34-35.

[179]. Indonesian forces remained in East Timor even though resistance from FRETILIN forces had diminished. Kamm, *supra* note 1, at 35.

Finally, in view of the purported annexation of East Timor,[180] Indonesia cannot reasonably maintain that humanitarian concern was its primary motive for the invasion. Annexation is not a necessary or collateral consequence of humanitarian intervention.[181] Viewed as an independent basis for invading East Timor, the effort at annexation casts significant doubts on the "humanitarian" nature of Indonesia's invasion.[182]

It should also be noted that the defense of humanitarian intervention is not explicitly recognized in the U.N. Charter. The failure to include a provision expressly recognizing the defense has led some jurists to argue that the Charter does not recognize the doctrine as justification for unilateral armed interventions.[183] In this event, of course, Indonesia's claim that humanitarian considerations motivated its invasion is irrelevant.

## Conclusion

Indonesia's armed attack on East Timor and denial of self-determination to the East Timorese flagrantly violated international law. Self-determination was denied by the Indonesian annexation of East Timor and Indonesia's attempts to justify the annexation on the grounds that the East Timorese had expressed a willingness to be "reintegrated," that historical, ethnic, and cultural ties between Indonesia and East Timor existed, and that East Timor had no economic viability are factually and legally unsupportable. Similarly, Indonesia cannot justify its invasion of East Timor by arguing self-defense, invitation, long-term regional security considerations, or humanitarian intervention. Again, the factual and legal support for these arguments does not exist.

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[180]. *See* note 44 *supra.*

[181]. On the contrary, annexation is in complete violation of the notions of "prompt disengagement" and "minimal effect on authority structures." *See* text accompanying note 172 *supra.*

[182]. The dubious nature of intervention as a basis for annexation is clear when considered in the context of India's intervention in East Pakistan (now Bangladesh). Gross violations of human rights were prevalent within East Pakistan and refugees were crossing the Indian border in larger numbers. Nevertheless, India made no effort to incorporate East Pakistan into its territory. *See* Franck & Rodley, *supra* note 171; Nanda, *Self-Determination in International Law*, 66 AM. J. INT'L L. 321 (1972).

[183]. Ian Brownlie, for example, maintains that state practice in the period of the U.N. Charter does not establish an interpretation of the Charter favorable to intervention to protect human rights. Brownlie, *supra* note 171, at 222. A number of leading modern authorities either make no mention of humanitarian intervention and take a general position that militates against its legality, or expressly deny its existence. J. BRIERLY, THE LAW OF NATIONS 309-10 (5th ed. 1955); P. JESSUP, A MODERN LAW OF NATIONS 157-158 (1956); Bishop, *General Course of Public International Law*, 115 RECUEIL DES COURS 423-41 (1965); H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 58-87 (2d Rev. ed. 1968). Other modern authorities have rejected the notion that the U.N. Charter prohibits intervention for humanitarian purposes, *see e.g.*, McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR C. REV. 19, 28-29 (1967); W. REISMAN, NULLITY AND REVISION 848-50 (1971); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 205, 230 (1969), and have developed criteria by which to assess claims of humanitarian intervention, *see id.* at 248; Nanda, *supra* note 173, at 475; Reisman, note 173, at 193. In the 1990s, debate centered on the extent to which the Security Council might authorize intervention on behalf of the community. Unilateral intervention received little support in those debates. *See, e.g.*, U.N.D.P.I., THE LIMITS OF SOVEREIGNTY, U.N. Doc. DPI/1178 (1992).

In spite of the weakness of its legal position, Indonesia has had the diplomatic support of a number of fellow Islamic states and of fellow members of ASEAN and OPEC,[184] as well as the "understanding" of its neighbors, Australia and New Zealand, and its ally, the United States.[185] At the time of this writing, there is little concrete to show for a series of initiatives by the Portuguese government whereby Lisbon has reaffirmed the Timorese right to self-determination and pledged itself to work with all interested countries towards a settlement.[186] Nevertheless, Portugal's insistence in not giving recognition to the Indonesian takeover represents a major barrier to Indonesia's efforts to have the matter slip away completely from world attention and scrutiny.

The United Nations has been the main forum for discussion of the Timor issue. What conclusions can be drawn about its role in the affair? The Security Council has not discussed the item since April, 1976, which probably indicates that the votes are simply not there to put it on the agenda, let alone to adopt a substantive resolution. But the Special Committee on Decolonization and the Fourth Committee of the General Assembly continue to hold annual debates on the whole question, and it is also debated in the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In short, the fact that Indonesia has acted contrary to international law has been reiterated — perhaps not with enthusiasm but reiterated nonetheless — each time the organization has considered the matter. In the face of slow diplomatic erosion, supporters of self-determination and independence for the East Timorese must take some comfort from the retention of the item on the international agenda. Sometimes in the symbolic world of diplomacy, keeping the matter "under review" is about the nearest thing to a sanction that can be achieved. In the broad sweep of history, keeping the item alive may provide some moral suasion aiding the eventual capitulation of Indonesia.[187] The United Nations has shown some capacity to stick with intractable hard cases. One is reminded of the fact that the organization persisted with the question of the Portuguese territories and with the racist Rhodesian regime for nearly two decades, in situations where it appeared that nothing would be done about either of those two matters. The organization persisted with the Southwest Africa/Namibia question for three and one-half decades, before Namibia finally won its independence. East Timor seems destined to become like Namibia, an issue that simply refuses to go away.

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[184]. *See* note 67 *supra*.

[185]. Each of these countries had, at least in the late 1970s, what appeared to it to be perfectly adequate political reasons for not wanting to upset Indonesia. Each was staunchly anti-Communist and viewed Indonesia as an ally in this cause. Each has an interest in Indonesian oil. Indonesia is not currently a substantial source of oil for any of them, but it is an important insurance supply in the event of difficulties in the Middle East. Australia expected that Indonesia might take a favorable position in shelf delimitation negotiations, *see* note 29 *supra*. In fact, Indonesia took a hard line in the negotiations, apparently concluding that Australia had done too well in the previous delimitations of the area between Australia and Indonesia itself. *See generally* Clark, *supra* note 130. The Law of the Sea negotiations played a role in United States relations with Indonesia. Apparently, Indonesia acquiesced in the United States' position that its submarines do not have to surface when passing through international straits such as those joining the Indian and Pacific Oceans, which are in waters claimed by Indonesia as archipelagic waters. *See* M. LEIFER, INTERNATIONAL STRAITS OF THE WORLD 160-68 (1978). Daniel Patrick Moynihan, former United States Representative to the United Nations, boasted of the way in which he helped keep the issue of East Timor muted in December, 1975. Concerning the questions of East Timor and Western Sahara, he has written:

> China altogether backed *Fretilin* in Timor and lost. In Spanish Sahara, Russia just as completely backed Algeria, and its front, known as *Polisario*, and lost. In both instances the United States wished things to turn out as they did, and worked to bring this about. The Department of State desired that the United Nations prove utterly ineffective in whatever measures it undertook. The task was given to me, and I carried to forward with no inconsiderable success.

D. MOYNIHAN, A DANGEROUS PLACE 247 (1978).

[186]. The notion of an ousted colonial power returning to complete the decolonization process might have been discounted had it not been for the precedent of the British returned to Rhodesia/Zimbabwe to supervise the elections there notwithstanding an absence of fifteen years.

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[187]. As long as the item remains on the agenda of the General Assembly as a decolonization issue it is hard for the Indonesians to claim that their annexation has been accepted by the world community. Retention of the matter on the agenda represents a kind of sanction to back up Article 53 of the General Assembly's Definition of Aggression, *see* note 132 *supra*, which provides that "[n]o territorial acquisition or special advantage resulting from aggression shall be recognized as lawful," its Declaration on Principles of International Law Concerning friendly relations and Co-operation Among States, G.A. Res 2625 (XXV), 25 U.N. GAOR, Supp. (No.28), at 121, U.N. Doc. A/8028 (1970), which provides that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal" and its Declaration on the Strengthening of International Security, G.A. Res. 2734, 25 U.N. GAOR, Supp. (No. 28) 22, U.N. Doc. A/8028 (1970), which also provides that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." *Id.* para. 5. *See generally* SUTER, *supra* note 1, at 5-8 (Australian *de facto* recognition of Indonesia's authority over East Timor; Australia's recognition and later de-recognition of Soviet control over the Baltic States); *Human Rights in East Timor: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*. 95th Con., 1st Sess. 77 app. (1977) (United States refusal to recognize Soviet incorporation of the Baltic states; more ambiguous American behavior concerning East Timor and Western Sahara); Clark, *supra* note 130.